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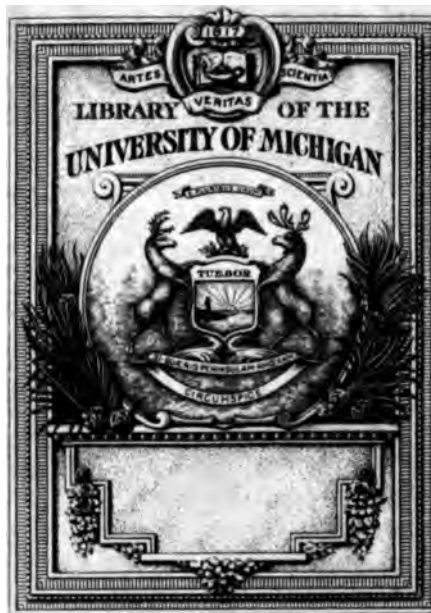
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55TH CONGRESS, } HOUSE OF REPRESENTATIVES. { DOCUMENT
2d Session. } { No. 554.

OFFICIAL OPINIONS
OF
THE ATTORNEYS-GENERAL
OF
THE UNITED STATES,
ADVISING THE
PRESIDENT AND HEADS OF DEPARTMENTS
IN RELATION TO THEIR OFFICIAL DUTIES,
AND EXPOUNDING THE CONSTITUTION, TREATIES WITH FOREIGN
GOVERNMENTS AND WITH INDIAN TRIBES, AND
THE PUBLIC LAWS OF THE COUNTRY.

EDITED BY
E. C. BRANDENBURG,
*Of the Bar of the District of Columbia and of the United States
Supreme Court.*

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+ S. 1975

VOLUME XXI.

CONTAINING

THE OPINIONS OF ATTORNEYS-GENERAL

HON. RICHARD OLNEY, of Massachusetts,

HON. JUDSON HARMON, of Ohio,

AND

HON. JOSEPH McKENNA, of California.

ALSO CONTAINING OPINIONS BY SOLICITORS-GENERAL

HON. LAWRENCE MAXWELL, JR., of Ohio,

HON. HOLMES CONRAD, of Virginia,

HON. JOHN K. RICHARDS, of Ohio,

AND

ACTING ATTORNEYS-GENERAL

HON. EDWARD B. WHITNEY,

HON. J. M. DICKINSON.

ALSO CONTAINING CITATIONS TO ACTS OF CONGRESS, THE REVISED
STATUTES, AN INDEX OF SUBJECTS, AND AN
INDEX DIGEST.

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OPINIONS
OF
HON. RICHARD OLNEY, OF MASSACHUSETTS.
APPOINTED MARCH 6, 1893.

COMPENSATION OF INFORMERS.

[The following opinion was inadvertently omitted from Volume XX:]

The Secretary of the Navy is, impliedly, authorized to contract for their compensation with persons furnishing information of frauds practiced upon the Government in the supplying of equipment which was not according to contract. (Rev. Stat., sec. 3732, considered in connection with 15 Opin., 235, 240.)

DEPARTMENT OF JUSTICE,
November 27, 1893.

SIR: Your communication of November 17 asks my advice as to whether you have authority to contract for their compensation with the persons offering you information of frauds upon your Department.

The facts are, in short, that you have outstanding contracts for a large amount of equipment; that large deliveries have been made under these contracts, but that the deliveries have not been completed, so that the contracts are still alive; that you have received certain information from employes of the contractor indicating frauds upon your inspectors by which articles have been accepted that are not completed according to the contract; that the information so far received has been proved correct and has been the cause of precautions by which the Department will be protected in the future; that it has been given under the understanding that proper compensation should be made and that further information is promised, through which it is believed that the Government can be made whole for all the losses it has suffered up to this time; but that to obtain this information it will be necessary to give the informants fair compensation, both for services done and services proposed. The informants will be contented with a percentage upon the moneys to

Compensation of Informers.

be realized by the Government as a result of the information furnished.

By section 3732 of the Revised Statutes, you are debarred from making any contract in the premises, "unless the same is authorized by law or is under an appropriation adequate to its fulfillment." The latest authoritative interpretation of this statute is contained in the opinion of Attorney-General Devens on the "Fifteen per cent contracts," as follows: "In order that a contract should be authorized by law, it must appear either that express authority was given to make such contract, or that it was necessarily to be inferred from some duty imposed upon, or from some authority given to, the person assuming the contract on behalf of the United States." (15 Opin., 235, 240.)

If, therefore, you have authority to make the proposed contract, it must be by implication from the statutes authorizing you to make the aforesaid contracts for equipment. The question is a difficult one, but it is my opinion that you have the authority desired. The statutes contemplated necessarily large expenditures on your part for inspection of articles offered before their acceptance. The proposed informants have seen things which the force you provided was inadequate to discover. It appears that, owing to overconfidence in the honesty of the contractor, the outlay for inspection force has been inadequate, and these informants propose, on being compensated for the necessary loss involved to themselves, to put you in the same position as if they had been all the while under your employ as watchmen. The contracts being still uncompleted, and the matter, therefore, still within your jurisdiction, I think that you can make such arrangements in the premises as you may deem best for the interest of the United States, whether we regard the proposed moneys to be paid in the nature of inspection for inspectors' wages, or for detective work.

The contract should be made with some responsible person who will represent all the rest. I inclose a draft which may give suggestions as to the form of contract desired.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

Import Duties—"Personal Effects."

IMPORT DUTIES—"PERSONAL EFFECTS."

Whether persons crossing into Canada, buying clothes there, and immediately returning with the clothes, can introduce them free of duty as "personal effects" involves a question of fact.

Persons crossing the line with no other purpose than to buy the clothes, and immediately returning, are not entitled to introduce them free of duty.

DEPARTMENT OF JUSTICE,
April 2, 1894.

SIR: Your communication of February 21 calls my attention to the practice of a certain Canadian tailor who comes across the line to North Troy, Vt., and other border villages with samples of cloth, soliciting orders for clothing; and you inform me that when the garments are ready they are delivered at a point just over the line in Canada, the purchasers crossing the line to get their clothes and returning wearing the clothes or carrying them in bundles. You ask substantially a single question, namely, whether these clothes are entitled to free entry under paragraph 752 of the tariff act of October 1, 1890, chapter 1244, as answering the following description:

"Wearing apparel and other personal effects (not merchandise) of persons arriving in the United States, but this exemption shall not be held to include articles not actually in use and necessary and appropriate for the use of such persons for the purposes of their journey and present comfort or convenience, or which are intended for any other person or persons, or for sale."

In my opinion, the nature of the transaction may be such that the buyers are not entitled to be classed as "persons arriving in the United States" within the meaning of this paragraph. That phrase can not be construed to include all persons crossing the Canadian line in a southerly direction, whether or not they may have crossed it in a northerly direction a few minutes previous with no purpose but that of bringing themselves within the letter of the paragraph quoted. Whether in any given case the clothes are or are not within the protection of this paragraph would be a question of fact.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

Unmailable Matter—Lottery.

UNMAILABLE MATTER—LOTTERY.

The business of a certain company considered and determined to be in the nature of a lottery within the meaning of sections 3894 and 4041 of the Revised Statutes, as amended.

DEPARTMENT OF JUSTICE,
April 4, 1894.

SIR: I have the honor to acknowledge yours of the 19th ultimo, requesting my opinion upon the question of the right of the Tontine Savings Association of Minneapolis, Minn., to use the United States mails in the carrying on of its business.

I concur in the conclusion reached by the Assistant Attorney-General for the Post-Office Department that the company's business is in the nature of a lottery within the meaning of sections 3894 and 4041 of the Revised Statutes of the United States, as amended by the act of September 19, 1890.

Very respectfully,

RICHARD OLNEY.

The POSTMASTER-GENERAL.

NOTE.—The association above referred to issued bonds, in numerical order, to their patrons, by which it agreed to pay to the holder of each bond, forty years after date, the sum of \$1,500, unless the bond was redeemed at an earlier date, according to the conditions on the back of the bond. An initiation fee of \$15 was charged, all of which went to the expense fund. Monthly dues were \$3, 12½ per cent of which was set apart to the expense fund, 50 per cent as a maturity fund, and 37½ per cent as a reserve fund.

Attached to each bond were three coupons for \$500 each, redeemable out of the maturity fund. The coupons on all the bonds were numbered from 1 up, in numerical order.

The coupons were redeemable out of the maturity fund in the order of 1, 3; 2, 6; 9; 4, 12; 5, 15; 18; 7, 21, etc.

Assistant Attorney-General (of the Post-Office Department) Thomas was of opinion that the plan of business of the Tontine Company was, in all essential particulars, similar to that of the Provident Bond and Investment Company, in reference to which company an opinion will be found in 20 Opinions, 748.—W. H. P.

Chinese Merchant—Return to the United States.

CHINESE MERCHANT—RETURN TO THE UNITED STATES.

Section 2 of act of November 3, 1893, chapter 14, amending the act approved May 5, 1892, chapter 60, construed; and *held*, that a member of a Chinese copartnership within the United States, whose name is not a part of the firm name, is not a "merchant" within the meaning of the section.

DEPARTMENT OF JUSTICE,

April 6, 1894.

SIR: I have the honor to acknowledge yours of the 3d instant, in which my opinion is requested upon the question whether a member of a Chinese copartnership, whose name does not form a part of the firm name under which the copartnership business is carried on, can leave the United States and return thereto as a merchant, under section 2 of the act approved November 3, 1893, amending the act approved May 5, 1892, entitled "An act to prohibit the coming of Chinese persons into the United States."

Section 2 of the act referred to defines a merchant in the following language: "A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

This requirement that a merchant must conduct the business in his own name can have but one purpose, to wit, that he who is a merchant in fact shall also be known to be such by the parties with whom he deals and by the public generally. That purpose could readily be defeated if it were permissible to conceal his identity by trading under an assumed name, or under the disguise of a "Co."

I am therefore of the opinion that a Chinese person does not bring himself within the statutory definition of merchant unless he conducts his business either in his own name or in a firm name of which his own is a part.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

Chinese—Attorney-General.

CHINESE.

The requirements of the act of July 5, 1884, chapter 220, should be strictly complied with by Chinese applicants for admission to the country.

DEPARTMENT OF JUSTICE,

April 10, 1894.

SIR: Your communication of April 6 incloses certain papers presented by Lee Gong and Mark Yune, claiming to be merchants resident at Toronto, Canada, and naturalized British subjects, but Chinese by birth. These papers are presented in support of applications for admission to this country. You ask my opinion whether they comply with the act of July 5, 1884 (chap. 220, sec. 6). The requirements of that act, in my opinion, should be strictly complied with by applicants for admission. The papers submitted to me do not comply with all the requirements of the act of 1884. For instance, the passports offered as certificates do not, in either case, state either the nature, character, or estimated value of the business carried on by the applicant. The consular visé supplies the nature and character of the business, but not its estimated value. It is not sufficient, however, that necessary information should be supplied by the visé alone. The statute requires the guaranty of the certificate as well as the visé upon each point.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

Certain steamship companies disputed the validity of the Treasury Department's regulations, holding them liable under the immigration act of March 3, 1891, chapter 551, for the maintenance and transportation to the seaboard of certain alien immigrants who had reached the interior of the country. *Held*, that as there was no way of enforcing the statute against the steamship companies except through the courts, the question is one arising in the Department of Justice, and the official opinion of the Attorney-General can not be required thereon.

Attorney-General.

DEPARTMENT OF JUSTICE,

April 12, 1894.

SIR: I have the honor to acknowledge the receipt of your communication of April 9, asking my opinion as to the lawfulness of one of your recently promulgated rules relating to the maintenance and deportation of alien immigrants.

The immigration act of March 3, 1891 (chap. 551, sec. 11), provides for the return to his own country, within one year from his immigration, of any alien who shall have come into the United States in violation of law, or who shall have become a public charge from causes existing prior to his landing in the country; and further provides that such return shall be at the expense of the person or persons, vessel, transportation company, or corporation bringing such alien into the United States. Section 10 of the same act provides for the immediate return of all aliens who may unlawfully come to the United States. It provides, further, that the cost of their maintenance while on land, as well as expense of the return of such aliens, shall be borne by the owner or owners of the vessel on which such aliens came, and that refusal to return them or to pay the cost of their maintenance shall be a misdemeanor punishable by fine.

On November 29, 1893, a circular was issued by the Superintendent of Immigration, approved by yourself, providing certain rules with relation to alien immigrants; these rules being promulgated under your general power to establish regulations and rules and issue instructions not inconsistent with law for carrying out the provisions of the immigration laws of the United States. (Act of Aug. 3, 1882, chap. 376, sec. 3.) Rule 7 of this circular provides that the expense of the return of any alien under the provisions of section 11 of the act of 1891 shall be at the expense of the person or persons, vessel, transportation company, or corporation bringing such alien; and it provides, further, that this expense shall include all expenses incurred for maintenance and transportation on land after such cases are brought to the attention of the Bureau of Immigration.

In other words, your Department construes the provision with regard to maintenance of aliens unlawfully landed as

Mails—Obstructing Carriage—Conspiracy.

applicable to the persons referred to in section 11 as well as those referred to in section 10 of the act of 1891. You also construe the expense of the return of such aliens as including the expense of their transportation to the seaboard from any interior point at which they may be apprehended.

The question is now raised by the steamship companies, who refuse to pay the expenses of maintenance and transportation to the seaboard in the case of aliens returned under the provisions of section 11. There are no means of enforcing the statutory provisions against the steamship companies except through the courts. In other words, the companies not being under control of the Executive Departments of the Government, your rule is ineffective except as a declaration of the law as construed by your Department, and its enforcement, if your construction is correct, is the duty of the Department of Justice.

Your question is substantially whether if a civil suit or criminal prosecution is instituted under the provisions of section 10 for the purpose of compelling payment of the maintenance and inland transportation of the aliens described in section 11 success would result. For the reasons stated by me in the opinions of January 29 and February 10, 1894, upon the questions submitted by you relating to a proposed attachment of goods at suit of the United States under the laws of the State of Maine, I think that your present question is not one arising in the administration of your Department within the meaning of section 356 of the Revised Statutes, and I therefore think that it would be improper for me to give an official opinion thereon.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

MAILS—OBSTRUCTING CARRIAGE—CONSPIRACY.

Any interference with the carriage of the mail upon railroads in the usual and ordinary way is a criminal offense, and a combination of offenders may be prosecuted under Revised Statutes, section 5440.

Mails—Obstructing Carriage—Conspiracy.

DEPARTMENT OF JUSTICE,

April 21, 1894.

SIR: I have the honor to acknowledge the receipt of your communication of to-day relating to the stoppage of passenger trains carrying the mails on the Great Northern Railroad.

The statutes of the United States provide that "every railroad company carrying the mail shall carry on any train which may run over its route all mailable matter directed to be carried thereon, with the person in charge of the same." The statutes also make it an offense for any person to "knowingly and willfully obstruct or retard the passage of the mail."

It has been decided by the courts, and, in my opinion, is clearly the law, that under these provisions of the statutes it is an offense for any person knowingly and willfully to obstruct or retard the passage of a train carrying the mail, and that it is no excuse that such person is willing that the mail car may be detached and run separately. He is bound to permit the mail to be carried in the usual and ordinary way, such as is contemplated by the act of Congress and directed by the Postmaster-General.

It would seem from your statement that the persons who have entered into the combination to which you refer have brought themselves within the further provisions of the statutes of the United States which declare that "if two or more persons conspire to commit an offense against the United States, * * * and one or more of such parties do any act to effect the object of the conspiracy, all the parties to the conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

Respectfully,

LAWRENCE MAXWELL, JR.,

Acting Attorney-General.

THE SECRETARY OF THE TREASURY.

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Hydraulic Mining—California Débris Commission.

HYDRAULIC MINING—CALIFORNIA DÉBRIS COMMISSION.

Section 19 of the act of March 1, 1893, chapter 183, creating the Commission, construed, with reference to a case stated, and *held*, that the Commission had power to take necessary steps to prevent injury, by hydraulic mining, to a navigable river within its jurisdiction, and that it might resort to the remedy of injunction, to be obtained on a bill in equity filed in the name of the United States, etc.

DEPARTMENT OF JUSTICE,

April 24, 1894.

SIR: Your letter of the 18th instant states that the California Débris Commission, created by act of Congress (27 Stat., 507) reports that the Volcano Gold Gravel Mining Company (a corporation) is mining by the hydraulic process in California, within the territory of the jurisdiction of the Commission, as defined by the act; that a portion of the "detritus" from this mining must reach the Sacramento River and do more or less injury to the navigability of this stream. That the company have not made application to mine, nor has it made the surrender referred to in section 10 of the act.

On this state of fact you submit for my opinion the following inquiries:

"1. As to the application to this case of the last sentence of section 19 of the act creating the Commission."

The sentence indicated is as follows:

"Said Commission shall take necessary steps to enforce its orders in case of the failure, neglect, or refusal of such owner or owners, company, or corporation, or agents thereof, to comply therewith, or in the event of any person or persons, company, or corporation working by said process in said territory contrary to law."

Section 19 applies to those mine owners who have filed the petition provided for in section 9 and have surrendered to the United States the right to regulate the working of the mine, as provided for in section 10. *But* it also extends to all who have not complied with sections 9 and 10, but who are "working by said process in said territory contrary to law."

Section 3 provides that—

"Hydraulic mining, as defined in section eight hereof, directly or indirectly injuring the navigability of said river

Hydraulic Mining—California Débris Commission.

systems, carried on in said territory other than is permitted under the provisions of this act *is hereby prohibited and declared unlawful.*"

So the Commission has the power to take such "necessary steps" as may be required to prevent or restrain those persons who by the operations of hydraulic mining are injuring the navigability of the river in the defined territory.

"2. Whether or not it is the duty of the Commission to give the company orders to cease hydraulic mining."

While it may not be strictly the legal duty of the Commission to give such orders, it would seem to be, on all accounts, preferable that before resorting to the harsh and drastic remedies of the law the attention of the offending company should be called to the provisions of the statute and to the acts and conduct of the company which appear to be in violation of those provisions, to the end that the evil complained of may be voluntarily removed and the company admonished of the consequence of continued recusancy.

"3 and 4. If the second question be answered in the affirmative, what course the Commission shall pursue to enforce such order. And what steps should be taken to enforce the provisions of the act."

The obvious remedy would seem to be by injunction, to be obtained from one of the judges of the Federal courts in California, on a bill in equity, brought in the name of the United States by the district attorney.

This appears to have proven efficient in the cases of *The People of the State of California v. The Gold Ditch and M. Company* (66 Cal., 138), on a state of facts nearly resembling that above stated; and in *Willamette Iron Bridge Company v. Hatch* (125 U. S., 1), where like principles were involved.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

Contract—Payment of Installments—Modification.

CONTRACT—PAYMENT OF INSTALLMENTS—MODIFICATION.

Contract for construction of battle ship *Indiana*, construed, and held, that it was not competent for the Secretary of the Navy, under the existing contract, to pay to the contractors any part of the last three installments of the price of the vessel or of reservations from previous payments, prior to the preliminary or conditional acceptance of the vessel; but that a supplemental contract might be entered into, modifying the terms and provisions of the existing contract.

DEPARTMENT OF JUSTICE.

April 27, 1894.

SIR: I have your letter of the 26th instant inclosing a copy of the contract for the construction of a seagoing coast-line battle ship *No. 1*, made the 19th November, 1890, between "The William Cramp & Sons Ship and Engine Building Company, a corporation," etc., party of the first part, and the United States, party of the second part.

You state that the contractors notified the Navy Department that the ship (*Indiana*) would be ready for her preliminary trial required by the tenth clause of the contract, on or about the 30th instant, "but in view of the report of a board of officers appointed to inspect the vessel, I am convinced that she is not in such condition as will permit of her trial at that time with due regard to the interests of the Government, and the trial will accordingly be postponed until a later date"; and you request an expression of my opinion as to whether "it is competent for me [you] *under the provisions of the contract for the construction of the Indiana* to pay the contractors any part of the last three installments of the price of the vessel or of the reservations from the previous payments prior to her preliminary or conditional acceptance, provided," etc.

The tenth clause of the contract provides "that when the vessel is completed and ready for delivery to the United States, as required by the drawings, plans, and specifications, she shall be subjected to a trial trip, in the open sea, under conditions prescribed or approved by the Secretary of the Navy, to test the hull and fittings," etc.

The eleventh clause of the contract provides: "If at and upon the trial trip before mentioned, the foregoing require-

Land Patent—Suit to Reform—Laches.

ments and conditions * * * shall be fulfilled * * * then and in such case the vessel shall be preliminarily accepted.”

The fifth section of the nineteenth clause provides: “The payment of the last three installments shall not be made except as provided for in the eleventh clause hereof.”

I am constrained to conclude, then, that it is not competent for you “under the provisions of the contract” to pay to the contractors any part of the last three installments of the price of the vessel or of the reservations from the previous payments prior to her preliminary or conditional acceptance.

The contracting parties may, however, so modify such of the terms and provisions of their contract—as in their opinion operate injuriously to their interests—taking care in so doing that the rights of each as already secured are not impaired by such alteration. Draft of such supplemental contract is inclosed.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

LAND PATENT—SUIT TO REFORM—LACHES.

Patents to Mexican land grants in California under the act of March 3, 1851, chapter 41, were conclusive only as between the United States and the patentees. They did not affect the interests of third persons. The surveys confirmed by such patents do not preclude a legal investigation and decision by the proper tribunals between conflicting claimants.

Third persons claiming title to the land thus patented may bring a suit to declare a trust in said land. Such a suit may be brought without the aid of the Attorney-General, and in the State courts. The decision of a State court upon such a suit, unappealed from, binds the parties thereto, whether righteous or erroneous.

When such third persons fail to sue until the period of the statute of limitations of the State has expired, they are barred by their *laches* from suing thereafter. That they had meanwhile been applying to Congress for relief is immaterial.

The Attorney-General should not institute for the benefit of private parties a suit to vacate or reform a United States land patent unless there is reasonable ground to believe that it will be sustained by the court; or, except for a wrong “which private litigation could not remedy.”

Land Patent—Suit to Reform—Laches.

DEPARTMENT OF JUSTICE,

April 28, 1894.

SIR: Your petition and argument on behalf of the Coppinger claimants have received specially careful attention, both on account of the value of the property in question and because the decision upon your application will be a precedent upon many others.

You represent persons now interested in the California ranch called Cañada de Raymundo, which ranch was granted in Mexican times to one Coppinger. Your clients, or their predecessors in title, actually occupied the territory in dispute, or some part thereof, from Mexican times down to their eviction under process of court about 1861. The disputed territory, while occupied and claimed by Coppinger and his family or grantees, was included in the patent for the neighboring ranch known as Las Pulgas. You now apply to me for a direction that the U. S. attorney for the northern district of California file a bill in equity to reform the patent of the Las Pulgas ranch, so that it shall not cover this disputed territory. On the original merits the questions are the same discussed in the cases of *Arguello v. United States* (18 How., 539, 543-544), *Greer v. Mezes* (24 How., 268, 275), and *De Arguello v. Greer* (26 Cal., 615). While the Las Pulgas patent was issued in 1857, no application seems to have been made on behalf of your clients or their predecessors in title to this Department or to the Department of the Interior until 1885.

Both Las Pulgas and Cañada de Raymundo were well-known Mexican ranches, both were submitted to the Board of Land Commissioners established under the act of March 3, 1851, chapter 41, and the titles of both were confirmed by this Board and by the courts on appeal, the final confirmation of each having occurred in 1856. You claim that, by the orders and decrees of confirmation in each case, properly construed, the territory in question belonged to the Cañada de Raymundo ranch; that its inclusion in the patent for the Las Pulgas ranch in 1857 was induced by fraud or gross mistake in the survey, and amounted to an overruling of the decisions of the Land Commissioners and of the courts; that the action of the Interior Department in confirming the sur-

Land Patent—Suit to Reform—Laches.

vey and issuing the patent did not bind the Coppingers, but that they were entitled to equitable relief in the premises.

From examination of all the papers on file these claims appear to be well founded; and it would follow that, upon proper proceedings, promptly instituted, the Las Pulgas patent ought to have been reformed. The questions, however, remain to be decided, whether it ever has been the duty of the Attorney-General, or would have been proper for him, to bring such a suit in the name of the United States; and, further, whether the lapse of time and subsequent litigations among the parties have affected your clients' rights.

In *Greer v. Mezes*, above cited, the Supreme Court held that your clients were not entitled to set up their rights in an action at common law. That action was ejectment brought against them by the owners of the Las Pulgas patent. After the decision, and in accordance therewith, the Coppingers were ejected from the premises in or about 1861. All were then of age except Manuela Coppinger, who came of age about 1868. The statute of limitations in California is five years. (*Curtner v. United States*, 149 U. S., 662, 676.)

In January, 1862, immediately after your clients were ejected, they were joined as defendants in a bill of peace in the State courts of California. The suit thus instituted was decided by the court of first instance in favor of the complainants, the Las Pulgas people, and this decision, on appeal, was affirmed by the supreme court of the State. (*De Arguello v. Greer*, *supra*.) The decree in this suit quieted the title and enjoined your clients from ever setting up further claim to the land. You insist that the State court had no jurisdiction, and that Federal questions were involved and treaty rights affected. Assuming this to be true, and assuming the decree and affirmance thereof to have been erroneous, nevertheless the appeal taken to the U. S. Supreme Court was allowed to be dismissed for informality about 1871, and no further attempt was made by your clients to maintain their rights in court. The State court, however, had, in my opinion, full jurisdiction of the controversy and power to settle every question involved. (*California Powder Works v. Davis*, 151 U. S., 389.) By the express terms of the act of 1851, and of the Louisiana act

Land Patent—Suit to Reform—Laches.

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Land Patent—Suit to Reform—Laches.

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Land Patent—Suit to Reform—Laches.

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Land Patent—Suit to Reform—Laches.

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vey and issuing the patent did not bind the Coppingers, but that they were entitled to equitable relief in the premises.

From examination of all the papers on file these claims appear to be well founded; and it would follow that, upon proper proceedings, promptly instituted, the Las Pulgas patent ought to have been reformed. The questions, however, remain to be decided, whether it ever has been the duty of the Attorney-General, or would have been proper for him, to bring such a suit in the name of the United States; and, further, whether the lapse of time and subsequent litigations among the parties have affected your clients' rights.

In *Greer v. Mezes*, above cited, the Supreme Court held that your clients were not entitled to set up their rights in an action at common law. That action was ejectment brought against them by the owners of the Las Pulgas patent. After the decision, and in accordance therewith, the Coppingers were ejected from the premises in or about 1861. All were then of age except Manuela Coppinger, who came of age about 1868. The statute of limitations in California is five years. (*Curtner v. United States*, 149 U. S., 662, 676.)

In January, 1862, immediately after your clients were ejected, they were joined as defendants in a bill of peace in the State courts of California. The suit thus instituted was decided by the court of first instance in favor of the complainants, the Las Pulgas people, and this decision, on appeal, was affirmed by the supreme court of the State. (*De Arguello v. Greer*, *supra*.) The decree in this suit quieted the title and enjoined your clients from ever setting up further claim to the land. You insist that the State court had no jurisdiction, and that Federal questions were involved and treaty rights affected. Assuming this to be true, and assuming the decree and affirmance thereof to have been erroneous, nevertheless the appeal taken to the U. S. Supreme Court was allowed to be dismissed for informality about 1871, and no further attempt was made by your clients to maintain their rights in court. The State court, however, had, in my opinion, full jurisdiction of the controversy and power to settle every question involved. (*California Powder Works v. Davis*, 151 U. S., 389.) By the express terms of the act of 1851, and of the Louisiana act

Land Patent—Suit to Reform—Laches.

DEPARTMENT OF JUSTICE,

April 28, 1894.

SIR: Your petition and argument on behalf of the Coppinger claimants have received specially careful attention, both on account of the value of the property in question and because the decision upon your application will be a precedent upon many others.

You represent persons now interested in the California ranch called Cañada de Raymundo, which ranch was granted in Mexican times to one Coppinger. Your clients, or their predecessors in title, actually occupied the territory in dispute, or some part thereof, from Mexican times down to their eviction under process of court about 1861. The disputed territory, while occupied and claimed by Coppinger and his family or grantees, was included in the patent for the neighboring ranch known as Las Pulgas. You now apply to me for a direction that the U. S. attorney for the northern district of California file a bill in equity to reform the patent of the Las Pulgas ranch, so that it shall not cover this disputed territory. On the original merits the questions are the same discussed in the cases of *Arguello v. United States* (18 How., 539, 543-544), *Greer v. Mezes* (24 How., 268, 275), and *De Arguello v. Greer* (26 Cal., 615). While the Las Pulgas patent was issued in 1857, no application seems to have been made on behalf of your clients or their predecessors in title to this Department or to the Department of the Interior until 1885.

Both Las Pulgas and Cañada de Raymundo were well-known Mexican ranches, both were submitted to the Board of Land Commissioners established under the act of March 3, 1851, chapter 41, and the titles of both were confirmed by this Board and by the courts on appeal, the final confirmation of each having occurred in 1856. You claim that, by the orders and decrees of confirmation in each case, properly construed, the territory in question belonged to the Cañada de Raymundo ranch; that its inclusion in the patent for the Las Pulgas ranch in 1857 was induced by fraud or gross mistake in the survey, and amounted to an overruling of the decisions of the Land Commissioners and of the courts; that the action of the Interior Department in confirming the sur-

Land Patent—Suit to Reform—Laches.

vey and issuing the patent did not bind the Coppingers, but that they were entitled to equitable relief in the premises.

From examination of all the papers on file these claims appear to be well founded; and it would follow that, upon proper proceedings, promptly instituted, the Las Pulgas patent ought to have been reformed. The questions, however, remain to be decided, whether it ever has been the duty of the Attorney-General, or would have been proper for him, to bring such a suit in the name of the United States; and, further, whether the lapse of time and subsequent litigations among the parties have affected your clients' rights.

In *Greer v. Mezes*, above cited, the Supreme Court held that your clients were not entitled to set up their rights in an action at common law. That action was ejectment brought against them by the owners of the Las Pulgas patent. After the decision, and in accordance therewith, the Coppingers were ejected from the premises in or about 1861. All were then of age except Manuela Coppinger, who came of age about 1868. The statute of limitations in California is five years. (*Curtner v. United States*, 149 U. S., 662, 676.)

In January, 1862, immediately after your clients were ejected, they were joined as defendants in a bill of peace in the State courts of California. The suit thus instituted was decided by the court of first instance in favor of the complainants, the Las Pulgas people, and this decision, on appeal, was affirmed by the supreme court of the State. (*De Arguello v. Greer*, *supra*.) The decree in this suit quieted the title and enjoined your clients from ever setting up further claim to the land. You insist that the State court had no jurisdiction, and that Federal questions were involved and treaty rights affected. Assuming this to be true, and assuming the decree and affirmance thereof to have been erroneous, nevertheless the appeal taken to the U. S. Supreme Court was allowed to be dismissed for informality about 1871, and no further attempt was made by your clients to maintain their rights in court. The State court, however, had, in my opinion, full jurisdiction of the controversy and power to settle every question involved. (*California Powder Works v. Davis*, 151 U. S., 389.) By the express terms of the act of 1851, and of the Louisiana act

Land Patent—Suit to Reform—Laches.

of 1831 therein referred to, the Las Pulgas patent was conclusive between the United States and the Las Pulgas claimants only, and did not affect the interest of third persons, and the survey thereunder was not in anywise to be considered as precluding a legal investigation and decision by the proper tribunals between conflicting claimants, but only to operate as a relinquishment on the part of the United States of all title to the land in question. The remedy of third parties is by the familiar suit to declare a trust in the lands obtained by the patentee. Such a suit may be brought without the aid of the Attorney-General, and in the State courts, under a long line of authorities. (*Johnson v. Towsley*, 13 Wall., 72; *Gibson v. Chouteau*, *id.*, 99, 102; *O'Brien v. Perry*, 1 Black, 139; *Widdicombe v. Childers*, 124 U. S., 400; *Cornelius v. Kessel*, 128 U. S., 456; *California Powder Works v. Davis*, *supra.*) The State courts having jurisdiction all parties were bound by their decisions, whether righteous or erroneous.

But had there been no litigation at all in the premises, your clients would have been barred by their *laches* in not instituting proper legal proceedings. (*Curtner v. United States*, 149 U. S., 662.) The fact that they knocked at the wrong door by vain applications to Congressional favor does not relieve them. Nor are they entitled to special consideration in this regard, for their true remedy was pointed out by Judge Hoffman in 1857 and by Land Commissioner Edmunds in 1863.

In view of the foregoing facts and considerations, the duty of the Attorney-General is not, I think, doubtful. The suit I am asked to initiate ought not to be brought unless there is reasonable ground to believe that it will be sustained by the court. But, after careful deliberation, and with the strongest desire that the applicants shall have every opportunity to secure justice, I am unable to see that such reasonable ground does exist. Without taking into account other formidable difficulties, the applicants must, in my judgment, be defeated on either of three distinct grounds: First, that the Attorney-General has no proper right to sue except for a wrong "which private litigation could not remedy" (*Curtner v. United States*, 149 U. S., 662, 672); second, that, with clear

Land Patent—Suit to Reform—Laches.

and ample remedies in their hands, your clients have been guilty of gross *laches* in resorting to them, and are barred by the statute of limitations; third, that they have had their day in court and have tried their claim in a suit directly between themselves and those in possession of the lands before a court having full jurisdiction of the controversy.

Under such circumstances it would be highly improper, I think, for the Attorney-General to lend the name and sanction of the United States to the proposed litigation. The consequences would be far-reaching, and would not merely affect the parties to this proposed suit. A precedent would be established to the effect that the Attorney-General must sue and call in question long-established land titles, and involve those interested in all the expense and hardship of years of controversy, whenever applied to in good faith, and even though, in his own judgment, the claim to be prosecuted was wholly destitute of legal foundation. My conception of the duty of the Attorney-General in such a case is different. When he sues for and in the name of the United States, he in effect represents that in his judgment the suit has legal merits deserving to be brought before the courts for their adjudication. It is true that in refusing to accede to an application to bring suit the Attorney-General may settle the rights of the claimants adversely and absolutely. In that view he of course assumes a grave responsibility. But just that responsibility is legally and rightfully devolved upon him. And the true result is not that he is to shirk it by bringing suit as matter of course every time he is asked to do so, but that each case is to receive careful and deliberate investigation, and suit be authorized only if a reasonable probability of its success is disclosed.

Your application for an order directing the U. S. attorney for the district of California to bring suit to reform the patent of the Las Pulgas ranch is therefore denied.

Respectfully, yours,

RICHARD OLNEY.

ROBERT W. HUNTER, Esq.,
Attorney at Law, City.

Chinese, etc.—Lien Laws—Property of United States, etc.

CHINESE—DETENTION PENDING DEPORTATION.

Under act of May 5, 1892 (chap. 60, sec. 7), the Secretary of the Treasury may authorize the landing at a port in this country of Chinese sentenced to deportation and their detention at said port until the vessel returns and is ready to proceed on her return voyage.

DEPARTMENT OF JUSTICE,
May 4, 1894.

SIR: I have the honor to acknowledge yours of the 2d instant, accompanied by certain inclosures which, as requested, I herewith return.

The question put to me is, as I understand, whether Chinese sentenced to deportation may be landed at Port Townsend on the voyage to Victoria and there be temporarily detained in the custody of the collector of customs until the return of the vessel from Victoria to Port Townsend, when they will be put on board the vessel and taken thence directly to Yokohama. Such an arrangement seems to me entirely competent under that provision of the act of May 5, 1892, by which the Secretary of the Treasury is directed to make such rules and regulations as may be necessary for the efficient execution of the act.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

LIEN LAWS—PROPERTY OF UNITED STATES—CONTRACTORS.

Assuming that the title to the land on which a dry dock is built, and the exclusive jurisdiction over it, are in the United States, the mechanic's lien laws of South Carolina do not operate thereon, and claims under such laws may be ignored in settlements with contractors.

DEPARTMENT OF JUSTICE,
May 11, 1894.

SIR: I have your letter of the 8th instant inclosing a copy of the contract between Justin McCarthy and the Chief of the Bureau of Yards and Docks for the construction of a timber dry dock at the coaling station, Port Royal, S. C., together with a certificate by the clerk of the court of Beaufort

Lien Laws—Property of United States—Contractors.

County, S. C., that two liens have been filed in his office for labor and supplies furnished in the construction of the dry dock. On the case stated in your letter you ask my opinion as to—

“Whether, by the insertion in the contract of said stipulation, that payment shall not be made if there be any lien upon the dock other than that of the United States, the exemption of Government property from the operation of the mechanics’ lien laws was waived so as to give legal effect to the liens of the kind described in the accompanying papers.”

Generally, on grounds of public policy, the mechanic’s lien laws do not, in the absence of express provisions, apply to public buildings erected by States for public uses.

And, further, the United States does not suffer itself to be sued without its consent; and a proceeding against it, or its property, for the enforcement of a mechanic’s lien would be a suit against it such as it does not allow.

Again, public property can be subjected to claims against it only when it is in the possession of the courts by the act of the Government seeking to have its rights established. (*The Siren*, 7 Wall., 152; *Carr v. United States*, 98 U. S., 432.)

But assuming that the title to the land on which the dock is built, and the exclusive jurisdiction over it, are in the United States, then the mechanic’s lien laws of South Carolina have no application to it. These laws are wholly the creature of statute, deriving their existence from positive enactment, by which alone is the lien created and imposed on the land. Congress is the only legislature by which such a lien can be created and imposed upon land under the exclusive jurisdiction of the United States. Because this land lies within the limits of South Carolina it is not subject to her laws, except there be in the act of her legislature, under which jurisdiction was ceded to the United States, a reservation of concurrent jurisdiction to the State. (*Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S., 532; *Commonwealth v. Clary*, 8 Mass., 72; *Foley v. Shriver*, 81 Va., 568; *Crook, Horner & Co. v. Old Point Comfort Hotel Co.*, 54 Fed. Rep., 604.)

Lien Laws—Property of United States—Contractors.

The fifth paragraph of the twelfth section of the contract forbids any payment, under the contract, "without satisfactory evidence, such as a county clerk's certificate, that there are no *existing liens* other than that of the United States upon such work or material."

From what has been already said, it follows that there are not and can not be any "mechanic's liens" on the dock for labor and supplies used in its construction, unless such liens attached before the property was acquired by the United States and built into or upon its land. In that case the principles stated and applied in *Briggs v. A Light Boat* (7 Allen, 292), will control. Paragraph 5, section 12, applies to any liens that exist upon the work and materials, without regard to *when* such liens were created. I wish to say that as to *mechanic's liens* created since the construction of the dock under this contract was begun, there are none existing; and no bar is raised by anything that appears in your letter to the payment of the money to the contractor as the contract provides.

In reply to your further question, I beg to say that I think it is competent for the Department to make payment to the contractor of the amounts to which he is or may become entitled under the contract.

While it is eminently desirable and proper that the Government should not aid or countenance its general contractors in withholding payment from those who have furnished labor and material for the construction of Government works, but should, where it may be practicable, require that they should be paid, yet the Government should not, in the absence of any legal liability upon it or upon its property for the debts of its contractors, make voluntary payment of such debts, because such payments might not avail as credits in the final settlement of accounts with the contractor.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

Chinese Merchants—Return to the United States.

CHINESE MERCHANTS—RETURN TO THE UNITED STATES.

The third paragraph of section 2 of act of November 3, 1893, chapter 14, construed, and *held*, that its provisions are to be regarded as merely prospective in their operation and as applying exclusively to Chinese merchants who both come into the United States for the first time since November 3, 1893, and having carried on business here, afterwards leave the country and seek to return.

Merchants already here when the statute took effect may leave the country and return as if the act of November 3, 1893, had not been passed.

DEPARTMENT OF JUSTICE,

May 14, 1894.

SIR: I have the honor to acknowledge yours of the 8th instant, asking my opinion upon the question whether Chinese merchants, lawfully in the United States when the statute of November 3, 1893, took effect, are within the provisions of the third paragraph of section 2 of that statute, which provides as follows:

“Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant and in default of such proof shall be refused landing.”

This paragraph undoubtedly presents serious difficulties of construction. To interpret its language literally would be to make Congress declare a new class of Chinese persons admissible to the United States, to wit, persons who might not be merchants at the time of their application and might even be laborers, but who had been merchants in the United States at some former period. For obvious reasons it is not possible to impute any such purpose to Congress, or to believe it did not intend that all persons, when applying under said third paragraph, should be merchants then, and not merely at some previous time. That view being inevita-

Chinese Merchants—Return to the United States.

ble, the persons covered by the third paragraph are clearly persons who, having previously come into the United States and carried on business here as merchants and still being merchants, have temporarily left the country and are seeking to return.

The question, however, still remains, whether this paragraph applies to merchants who had come into the country and were doing business here before the passage of the act of November 3, 1893. The consequences of that construction are obvious. A Chinese merchant lawfully here and lawfully doing business here before November 3, 1893, under some other name than his own, could not depart from the country for at least a year from that time, except under the penalty of not being able to return. Neither could he leave at any later period with the right of return, unless he had first carried on his business in this country for a year in his own name. But nothing in the law requires a Chinese merchant who was here prior to November 3, 1893, to make any change in his mode of doing business—to conduct it, for instance, in his own name rather than in an assumed name. Nothing in the law in any way countenances the idea that such a Chinese merchant is meant to be hindered from temporarily leaving the country by the necessity of changing his established business methods. Yet so serious alterations of the status of persons rightfully in the United States when the act of November 3, 1893, took effect are not to be brought about by mere implication, unless such implication be unavoidable, and certainly are not to be so brought about if they will be avoided by treating the statute as wholly prospective in its operation. The ordinary presumption applicable to every statute is to prevail in the case of the act of November 3, 1893, namely, that it lays down a rule of conduct for the future, but makes no change in rights already acquired or conditions already established.

Such a presumption yields, of course, to any language indicative of an intent to change the existing status of any persons or class of persons, or to take away or impair any rights or privileges already enjoyed. But nothing can be found in the law in question suggestive of any such purpose as regards Chinese merchants already commercially domi-

Import Duties—Warehoused Goods.

ciled in the United States, while the statute must be construed, as emphatically declared by the Supreme Court of the United States in an analogous case (*Lau Ow Bew*, 144 U. S., 47), not only so as not to produce absurd or incongruous or unjust results, but so as to produce the least conflict with existing treaties providing for the free ingress and egress of Chinese merchants into and from the United States.

I am constrained to the conclusion, therefore, that this third paragraph of section 2 of the act of November 3, 1893, is to be regarded as wholly prospective in its operation and as applying exclusively to Chinese merchants who both come into the United States for the first time since November 3, 1893, and having carried on business here, afterwards leave the country and seek to return. Merchants already here when the statute took effect may leave the country and return as if the act of November 3, 1893, had not been passed.

Respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

IMPORT DUTIES—WAREHOUSED GOODS.

Goods imported and warehoused for nearly three years, then withdrawn and exported, and finally reshipped to the United States by a different merchant, there being no evidence that the transaction was a colorable one to evade the tariff laws, may be entered for warehousing as an "original importation" within Revised Statutes, section 2971. If the transaction were merely colorable? *Quære*.

DEPARTMENT OF JUSTICE,
May 19, 1894.

SIR: I am in receipt of your communication of April 6 asking my official opinion as to whether certain wool imported at Philadelphia is lawfully entitled to the privileges of an original warehouse entry under the customs laws. It appears that this wool was imported into the United States early in 1891 and remained in warehouse nearly three years, when it was withdrawn for exportation to Canada. Very shortly thereafter it was reshipped to the United States by

Import Duties—Warehoused Goods.

a different merchant, who has applied to have it entered for warehousing as if a new "original importation." You ask whether it is entitled to be considered an original importation under the terms of section 2971 of the Revised Statutes.

Attorney-General Williams, in 1875, answered the question in the affirmative (14 Opin., 574). He held that warehoused goods could be withdrawn, sent across the border, and then reimported and reentered for warehousing for a new three years' term as if they never before had been in the country, and this even if the transaction were for the purpose of evading a duty to which they would otherwise be liable.

A question once definitely answered by one of my predecessors and left at rest for a long term of years should be reconsidered by me only in a very exceptional case; but so far as the opinion above mentioned applies to goods exported for the mere purpose of reimporting them so as to extend the warehousing period, the subsequent opinions of Attorneys-General Brewster and Garland upon analogous questions arising under the internal-revenue laws (17 Opin., 579; 18 Opin., 381) might be regarded as justifying reconsideration in this instance.

Neither your letter nor the inclosed letter from the Philadelphia collector, however, states as a fact that there was any intention on the part of the importer whose case is now before you to evade any statutory provision. It may be that the goods were *bona fide* sold in the open market after export, and that the intent to reimport them was first formed by the vendee after the sale had been perfected. Except where the transaction is shown to be a mere colorable one, so that there is no real exportation and importation of the goods at all within the later rulings of this Department, the definition established by Attorney-General Williams so long ago should stand unquestioned by me; and I therefore advise you that these Philadelphia goods are to be regarded as an original importation upon the facts stated.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

Tax on Retail Liquor Dealers—Shipwrecked Seamen, etc.

TAX ON RETAIL LIQUOR DEALERS.

The opinion of Attorney-General Miller, of May 15, 1889 (19 Opin., 306), does not conflict with the collection of the special tax on retail liquor dealers in the Indian country and Alaska under Revised Statutes, section 3244.

DEPARTMENT OF JUSTICE,

May 24, 1894.

SIR: I have the honor to acknowledge the receipt of your communication of May 22, inclosing a letter of the Commissioner of Internal Revenue and an opinion of the Solicitor of Internal Revenue relating to the collection of a special tax from retail liquor dealers in the Indian country and in Alaska under section 3244 of the Revised Statutes. The Commissioner and Solicitor state that according to their understanding of the law such tax is collectible, but that they find an obstacle to its collection in an opinion of Attorney-General Miller, rendered May 15, 1889. (19 Opin., 306.) You accordingly ask me to advise you whether I concur in that opinion.

I find, on examining the opinion you refer to, that no question was asked of the Attorney-General relating to the Indian country or Alaska. His references to the position of liquor dealers in the Indian country were *obiter* merely, and hence do not have the force and effect of an official opinion of this Department. Those whose cases were then under consideration he held to be taxable, and his ruling constitutes no obstacle to any action now desired to be taken by your Department. I therefore return the inclosures without further comment.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

SHIPWRECKED SEAMEN—ASSISTING—WITHHOLDING FROM PAY.

Where a U. S. consul-general has provided shipwrecked, destitute seamen with food, clothing, and passage to a port in this country, the amount so expended should not be deducted from the wages of such seamen.

Shipwrecked Seamen—Assisting—Withholding from Pay.

DEPARTMENT OF JUSTICE,

May 24, 1894.

SIR: I have your letter of the 22d, inclosing letters from the U. S. consul-general at Honolulu and the shipping commissioner at San Francisco, from which it appears that the American bark *Hilo* was wrecked in the region of the Hawaiian Islands; that the seamen were "utterly destitute" when they reached Honolulu; that the U. S. consul-general there provided them with food and clothing and procured for them passage to San Francisco; and wrote to the U. S. shipping commissioner at San Francisco, advising him of the facts, and inclosed to him an itemized statement of the amount in value of the supplies furnished to each of the seamen. The owners of the vessel paid the amounts due to the men for wages, but as each man was paid off the U. S. shipping commissioner withheld from his wages the amount expended by the consul-general at Honolulu for his relief. The men protested and demanded their full pay.

The amount so withheld by the U. S. shipping commissioner is still retained, and you ask my opinion "whether the amount so reserved should be retained by the Government, or be paid to the seamen by the shipping commissioner."

Congress appears to have intended and provided different measures and kinds of relief for two distinct classes of seamen.

In the class of cases provided for by sections 4580, 4581, 4582, 4583, 4600, 4561, Revised Statutes, as amended June 26, 1884 (23 Stat. L., 53), the consular officers of the United States are required to see that the discharged seamen receive from the master of the vessel the extra pay therein prescribed. And by section 4584, Revised Statutes, they are further required to retain one-third of the amount of the wages so paid "for the purpose of creating a fund for the payment of the passages of seamen * * * and for the *maintenance* of American seamen who may be destitute and may be in such foreign port."

By section 4583 it is expressly provided that "no payment of extra wages shall be required upon the discharge of any seamen in cases where vessels are wrecked or stranded." * * *

Contract—Delay in Completing—Remitting Penalties.

By sections 4577 and 4579, Revised Statutes, provision is made for seamen who are *destitute* by reason of wrecking, stranding, etc. It is made the duty of the consular officers of the United States "to provide for the seamen of the United States who may be found destitute within their districts, respectively, sufficient subsistence and passages to some point in the United States in the most reasonable manner, at the expense of the United States, subject to such instructions as the Secretary of State shall give. The seamen shall, if able, be bound to do duty on board the vessels in which they may be transported, according to their several abilities."

And by section 4579 provision is made for the payment of reasonable compensation by the United States to the owner of the vessel in which the seamen are transported.

From which it would seem that while those seamen who were discharged under the conditions described in the sections amended by the act of June 26, 1884, and who received extra pay, were required to contribute from their extra pay to the relief of the destitute seamen, that the seamen who were discharged by reason of wrecking or stranding of their vessels received no extra pay and were to be maintained and brought home at the expense of the Government out of the fund created for that purpose and from appropriations made by Congress in the regular general appropriation bills.

I am of opinion, then, that the amount reserved by the shipping commissioner at San Francisco from the wages of these destitute seamen should not be retained by the Government, but should be refunded to the seamen.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

CONTRACT—DELAY IN COMPLETING—REMITTING PENALTIES.

Where penalties are imposed under the terms of a contract between the War Department and a contractor for delay in completing the work, but the contract has been performed in all other respects and no actual damage has resulted from the delay, the Secretary of War may remit the forfeiture.

Contract—Delay in Completing—Remitting Penalties.

DEPARTMENT OF JUSTICE,

May 28, 1894.

SIR: I have your letter of the 14th instant, inclosing copy of a contract between the post quartermaster at West Point and John Moore, of Syracuse, N. Y., for completing the gymnasium at West Point.

In the printed "advertisement and specifications" for the erection of the gymnasium it is provided that:

"The contractor will be required to commence building operations within ten days after the approval of the contract and to push the work regularly and vigorously, so as to have it completed and ready for occupancy by January 1, 1892. For every day, including Sundays, after January 1, 1892, that the building is not entirely completed according to this contract the contractor shall forfeit to the United States \$25 per day, to be deducted from the final payment to be made to him."

It appears that the building was not completed by January 1, 1892, but that the time for completion was extended from time to time to August 31, 1892. The building was not fully completed until October 19, 1893; and there has been withheld of the contract price the sum of \$10,350, being the amount of the forfeiture of \$25 per day from August 31, 1892, to October 19, 1893.

It appears that on October 31, 1892, the architect, by direction of the Superintendent of the Military Academy, made a "complete and careful inspection of the structure" and reported that the amount to be done to complete it according to the contract was "comparatively trifling."

You request that I will advise your Department "whether the Secretary of War has authority to remit the forfeiture provided in the contract and to order the payment of the entire sum withheld from the contractor."

Inasmuch as the forfeiture or penalty incurred here was one imposed by the contract between the parties and not by any act of Congress, and the work contracted for has all been finished according to the contract, and no actual damage has resulted to the United States, and the penalty was one from which, in like cases, a court of equity would

Mississippi River—South Pass Channel—Eads Contract.

grant relief, I am of opinion that the Secretary of War has authority to remit the forfeiture provided for in the contract and to order payment of the entire sum withheld from the contractor.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

MISSISSIPPI RIVER—SOUTH PASS CHANNEL—EADS CONTRACT.

The contract between the United States and James B. Eads and his associates for the construction of a ship canal between the South Pass of the Mississippi River and the Gulf of Mexico, construed; and opinions of Attorney-General Devens (16 Opin., 335) and Acting Attorney-General Phillips (17 Opin., 137) as to the width and characteristics of channel required to be maintained concurred in.

DEPARTMENT OF JUSTICE,

May 29, 1894.

SIR: I have your communication of the 23d of May, inclosing a letter from Maj. James B. Quinn, of the Engineer Corps, referring to the contract between the United States and James B. Eads and his associates for the construction of a ship canal between the South Pass of the Mississippi River, and you ask me to "inform this [War] Department as to what width and characteristics of channel are required to be maintained through the bar at the head of South Pass and throughout the pass itself by the terms of this contract."

The contract to which you refer can be ascertained only from the various acts of Congress relating to the subject, and to these recourse must be had for the reply to your inquiry. These statutes will be found in 18 Stat. L., 463-466; 20 Stat. L., 168 and 376; and 25 Stat. L., 1334.

By act of March 3, 1875 (18 Stat., 463), James B. Eads and his associates undertook—

"To construct such permanent and sufficient jetties and such auxiliary works as are necessary to create and *permanently maintain*, as hereinafter set forth, a wide and deep channel between the South Pass of the Mississippi River and the Gulf of Mexico * * *.

"Upon full compliance with the conditions prescribed, the United States promised and agreed to pay to Eads

Mississippi River—South Pass Channel—Eads Contract.

“\$5,250,000 for constructing said work and obtaining a depth of 30 feet in said channel.”

This act further provides for the payment of the money in installments as certain results were reached in the course of construction of the work.

When a channel 30 feet in depth and 350 in width, shall have been obtained, the remaining \$1,000,000 shall be deemed to have been earned by Eads and his associates, but the amount shall remain in the possession of the United States for the purposes set forth in the act, interest thereon to be paid to Eads, etc., as long as the money is held.

“That after said channel of thirty feet in depth and of not less than three hundred and fifty feet in width shall have been secured, one hundred thousand dollars per annum shall be paid in equal quarterly payments during each and every year that said channel of thirty feet in depth and three hundred and fifty feet in width shall have been maintained by said Eads and his associates by the effect of said jetties and auxiliary works aforesaid in said pass, for a period of twenty years, dating from the date on which said channel of thirty feet in depth and three hundred and fifty feet in width shall be first secured: *Provided, however,* That no part of such annual compensation shall be paid for any period of time during which the channel of said pass shall be less than thirty feet in depth and three hundred and fifty feet in width, as hereinbefore specified.

“That the said channel of thirty feet in depth and three hundred and fifty feet in width having been maintained for ten years, one-half of the one million dollars hereinbefore mentioned shall be released and paid to said Eads, his assigns, or legal representatives; and said depth and width having been maintained for ten additional years, the remaining half of the said one million dollars shall be released and paid as aforesaid.”

By act approved June 19, 1878 (20 Stat. L., 168), the former act was amended in certain particulars as to the payment of \$500,000 in advance for labor, material, etc. But this act further provides:

“All other payments to said Eads * * * are to be made under and in pursuance of the provisions of the herein-

Mississippi River—South Pass Channel—Eads Contract.

before-recited act; the whole of said act, except as the same is hereby expressly modified or amended, to have the same force and effect as if this act had not been passed."

By joint resolution of February 14, 1889 (25 Stat. L., 1335), \$500,000 of this \$1,000,000 was appropriated and ordered to be paid to the legal representatives of James B. Eads.

It appears now, from the letter of Major Quinn and the blue-print maps inclosed therewith, that a channel of 26 feet in depth and 250 feet in width has not been maintained.

I have carefully examined the history of the execution of this contract as the same appears in the Senate documents of the Forty-fifth, Forty-sixth, and Forty-seventh Congresses, in the records of the War Department, and in the opinions of the Attorneys-General; and I find that in the opinion of May 17, 1879, of the Hon. Charles Devens, Attorney-General (16 Opin., 335), the following construction is given of the words "navigable depth," referred to in the letter of Major Quinn:

"What is the meaning of the words 'navigable depth' is a question partly of law and partly of fact. It is a depth sufficiently wide to admit of safe navigation. In considering what was intended to be provided for the whole character of the structure contemplated is to be examined. This shows that a channel of considerable width, in which necessarily vessels could pass each other as they ascended and descended the river, was contemplated. And this navigation is not limited to any particular class of vessels—as, for instance, those propelled only by steam. The legal meaning of the term 'navigable depth' is a depth sufficiently wide, therefore, to be navigated by vessels either moved by sails or steam, and to permit them to pass each other in the channel formed through the pass and the shoal at its head.", etc.

In the opinion of the Hon. S. F. Phillips, Acting Attorney-General, of June 27, 1881 (17 Opin., 137), the question propounded to me in your letter appears to have been substantially answered. In that opinion it was held:

"1. That a navigable depth of 26 feet is thereby required to be maintained through the shoal at the head of the Pass.

"2. That a navigable depth of 26 feet is required to be maintained through the Pass itself."

Eight-hour Law.

I concur in the reasoning and conclusions expressed in these opinions, and respectfully refer to the opinions themselves for a reply to your inquiry—"as to what width and characteristics of channel are required to be maintained at the bar at the head of South Pass and throughout the pass itself by the terms of the contract."

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

EIGHT-HOUR LAW.

Certain foremen at the Fort Leavenworth Military Prison are not "laborers or mechanics" within the eight-hour law of August 1, 1892 chapter 352.

DEPARTMENT OF JUSTICE,

June 7, 1894.

SIR: I have the honor to acknowledge your communication of May 26, asking my official opinion as to whether certain employés at the military prison, Fort Leavenworth, Kans., are entitled to the benefits of the eight-hour law of August 1, 1892, chapter 352, as "laborers or mechanics."

It appears that four of these men are employed at the prison as "foremen of mechanics," and are each paid under the sundry civil appropriation act of March 3, 1893 (27 Stat., 602), a stated salary of \$1,200 per annum. Their duties appear to be directing mechanical labor of the prisoners. By section 1345 of the Revised Statutes a board organized by you is empowered to "frame regulations for the government of prisons." You inform me that the regulations so framed require more than eight hours' work of the prisoners, and therefore necessarily require more than eight hours' work of the men who are set to watch and direct them. Under these circumstances it is my opinion that the eight-hour law is not applicable to these employés. The facts as to the other employés mentioned are not so clearly stated, but their case appears to be governed by the same principles.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

Civil Service—Bona Fide Residence.

CIVIL SERVICE—BONA FIDE RESIDENCE.

The facts bearing upon the question of the residence of Edward D. Morrill on August 4, 1890, considered; and, *held*, that Morrill was not an actual and bona fide resident either of the county of Wilcox or of the State of Alabama on the date named, nor had he been for any of the six months next preceding that date.

DEPARTMENT OF JUSTICE,

June 8, 1894.

SIR: My opinion is asked with reference to the question whether or not Edward D. Morrill was a resident of Alabama at the time of his appointment under the civil-service rules in the Interior Department, to wit, on August 4, 1890. The evidence in this case, upon which opinion is asked, consists of, first, the affidavit of three men who are stated to have knowledge on the subject, that Morrill has never resided in the State of Alabama or been a citizen of said State since the 9th day of November, 1886; and, secondly, the statement of Morrill himself, that, having a home in Camden, Wilcox County, Ala., in 1886, he engaged in various kinds of temporary business in other States until December of that year, when he returned to Camden, put his property in a condition to leave by repairing, painting, and renting it, and in March, 1887, sent part of his personal effects to Chattanooga, Tenn.; was engaged through the summer of 1887 in temporary employment in Dalton, Ga., and on its completion went to Chattanooga, where he engaged in business apparently permanent in its character.

In December, 1887, he returned to Camden long enough to arrange with tenants and collect rents, occupying meanwhile certain reserved rooms in his house, returned to Chattanooga in February, 1888, and apparently remained there until December following, voting at the general election in November, 1888, at Chattanooga. On December 1, 1888, he went to Camden to look after his property, and returned to Chattanooga the 23d of the same month. On April 4, 1889, he gave up his rented house in Chattanooga, stored his furniture in that neighborhood, spent the summer traveling, and late in the fall went to Camden for a period not stated, but certainly

Shipwrecked Seamen—Deduction from Pay.

not longer than four months, as he was in Washington in March, 1890, since which time he has actually lived in that city.

Upon this state of facts it seems to me that the fact of Morrill's residence at Chattanooga on and for a year prior to November, 1888, is established by his own act in voting at that place, and that there is nothing as to his subsequent movements sufficient to show an abandonment of that residence and the acquisition of a new one at Camden, Ala. I therefore am of opinion, upon the facts before me, that Edward D. Morrill, on August 4, 1890, was not an actual and *bona fide* resident either of the county of Wilcox or of the State of Alabama, nor had he been for any of the six months next preceding that date.

Very respectfully,

RICHARD OLNEY.

The PRESIDENT.

SHIPWRECKED SEAMEN—DEDUCTION FROM PAY.

Opinion of May 24, 1894 (*supra*, p. 25), reaffirmed.

DEPARTMENT OF JUSTICE,

June 14, 1894.

SIR: By letter dated 22d May, 1894, inclosing letters from the U. S. consul-general at Honolulu and the U. S. shipping commissioner at San Francisco, you presented to me the case of certain seamen of the American bark *Hilo*, which was wrecked near the Hawaiian Islands. These seamen were "utterly destitute" when they reached Honolulu. The consul-general supplied their necessary wants and shipped them to San Francisco. He wrote to the shipping commissioner at San Francisco, inclosing a statement of the amount in value of the necessaries furnished the seamen, and requested him to withhold the amount furnished to each seaman from the wages due him when the same were paid to him in San Francisco. The shipping commissioner did so, and you asked my opinion whether the amount so reserved should be retained by the Government or be paid to the seamen by the shipping commissioner. I replied by letter dated May 24,

Shipwrecked Seamen—Deduction from Pay.

and stated, as the conclusion which I had reached, "That the amount reserved by the shipping commissioner at San Francisco from the wages of these destitute seamen should not be retained by the Government, but should be refunded to the seamen."

Recent consideration of the matter has confirmed that conclusion. The only provision of the existing statutes requiring the retention of seamen's wages to meet their expenses appears in section 4581, Revised Statutes, as amended (23 Stat., 55, and 25 Stat., 80), which provides that—

"If any seaman, *after his discharge*, shall have incurred any expense for board, or other necessities * * * ."

In this case the expenses were all incurred at Honolulu *before* the seamen were discharged and paid off in San Francisco. Until a seaman is regularly discharged in one of the ways provided by statute, he remains under his shipping articles, and is to be maintained by the master of the ship, as stipulated in the articles.

When an American seaman is found destitute within the district of a U. S. consular officer, he is to be provided for as prescribed in sections 4577 and 4579, Revised Statutes.

But that no unwarranted inferences may be drawn from my letter of May 24, I think it proper to say now that the extracts quoted therein from certain sections of the Revised Statutes, which are referred to as amended, were inserted there only to illustrate what seemed to be the policy of the Government as to two classes of seamen who were discharged for different causes, and not as existing and operative provisions of statute on which the conclusion I expressed at all depended.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

Attorney-General—World's Fair.

ATTORNEY-GENERAL—WORLD'S FAIR.

The Attorney-General can not give official opinions except upon questions of law, nor without a definite statement of the facts upon which the question is submitted.

The question of drawbacks upon the exhibits of foreign Governments at the World's Fair of 1893 is governed by the act of April 25, 1890 (chap. 156, sec. 11), and not by the Revised Statutes.

DEPARTMENT OF JUSTICE,

June 14, 1894.

SIR: Your communication of June 9 incloses the correspondence with the Swiss chargé d'affaires at Washington and the Swiss consul at Chicago relating to the refund of duties paid on certain Swiss exhibits at the World's Columbian Exposition, and asks my opinion "as to whether the Department, under the circumstances, and considering the special character of the enterprise and the status of the importers, should grant the request of the consul." This is not a question of law, and I am therefore not warranted by section 356 of the Revised Statutes in answering it, nor can I properly make a statement of facts for my own use out of this correspondence. The facts upon which the question is submitted should "be agreed and stated as facts established." (19 Opin., 396, 696.)

It appears by the opinion of the Solicitor of the Treasury, which was transmitted with the papers, that the real question that arises is whether section 3025 of the Revised Statutes is applicable to this case. Were this question directly submitted, I would answer that in my opinion it does not apply to the exhibits of foreign Governments at the recent Exposition, which are governed by section 11 of the act of April 25, 1890, and by your regulations thereunder, which regulations it is rather your province than mine to construe.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

Chinese Naturalization—Attorney-General.

CHINESE NATURALIZATION—ATTORNEY-GENERAL.

Since the act of May 6, 1882, chapter 126, no court, State or Federal, has had jurisdiction to admit Chinese to citizenship.

The question as to how far a certain judgment was void for want of jurisdiction should not be determined until actually presented for decision in a case in which a party to such judgment shall be a party.

DEPARTMENT OF JUSTICE,

June 15, 1894.

SIR: I have your letter of 13th of June, inclosing a letter from the collector of customs at Astoria, Oreg., and a copy of a letter from the Solicitor of the Treasury, expressing the opinion that the naturalization papers issued in the year 1878 in New Orleans, La., to some 50 Chinamen, were issued without authority of law and are void, and you request an opinion from me on the question submitted in the letter from the collector of customs at Astoria, Oreg.

Without entering upon the ethnological questions, so learnedly discussed in the opinion of the Solicitor of the Treasury, but referring, on that aspect of the question, to Webster's dictionary—*Race*—and the opinion of Sawyer, J., in *Ah Yup* (5 Saw., 157), it is sufficient for the present purpose to say that under section 2169, Revised Statutes, the privilege of naturalization is limited "to aliens being free white persons and to aliens of African nativity and to persons of African descent."

In *Fong Yue Ting v. The United States* (149 U. S., 698), Mr. Justice Gray, delivering the opinion of the court, says, page 716:

"Chinese persons not born in this country have never been recognized as citizens of the United States nor authorized to become such under the naturalization laws." (Rev. Stat., 2d ed., secs. 2165, 2169; acts of April 14, 1802, chap. 28, 2 Stat., 153; May 26, 1824, chap. 186, 4 Stat., 69; July 14, 1870, chap. 254, sec. 7, 16 Stat., 256; February 18, 1875, chap. 80, 18 Stat., 318; *In re Ah Yup*, 5 Saw., 155; act of May 6, 1882, chap. 126, sec. 14, 22 Stat., 61.)

Section 14 of the act of May 6, 1882, chapter 126 (22 Stat., 61), referred to by Mr. Justice Gray, is as follows:

"That hereafter no State court or court of the United

Lien on Merchandise Imported for Exportation.

States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed."

It is certainly very clear that since May 6, 1882, no court, State or Federal, has had jurisdiction to admit Chinese to citizenship.

It was held by the circuit court of the district of California, in April, 1878 (*In re Ah Yup*, 5 Saw., 155), that a native of China is not entitled to become a citizen of the United States under the Revised Statutes as amended in 1875; and this view has been adopted in subsequent cases.

How far the judgment of the court in Louisiana in admitting to citizenship the 50 Chinese referred to here was void for want of jurisdiction is a question the determination of which may better be deferred until actually presented for decision in a case in which one or more of the 50 Chinamen referred to shall be parties.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

LIEN ON MERCHANDISE IMPORTED FOR EXPORTATION.

Article 309, Customs Regulations, 1892, providing " * * * Nor can liens be recognized for freight on merchandise intended for export," is inconsistent with Revised Statutes, section 281, as amended.

DEPARTMENT OF JUSTICE,

June 16, 1894.

SIR: I have your letter of June 1, 1894, inclosing a letter of 20th of January from H. Maitland Kersey, on behalf of certain steamship companies, requesting a modification of the Treasury regulations relating to liens for freight; a letter from George O. Glavis, of May 5; and an opinion of the Solicitor of the Treasury of May 28, on the same subject, and you ask for an "expression of opinion" from me "in the matter."

It is by no means clear from these letters just what the "matter" is on which my opinion is desired. I will assume that it is to inquire whether, in my opinion, section 2981,

Lien on Merchandise Imported for Exportation.

Revised Statutes, as amended, affords to the owner or consignee of a vessel arriving from a foreign port a lien for freight on the merchandise imported on such vessel when such merchandise is imported for exportation. Section 2981 is as follows:

“Whenever the collector or other chief officer of the customs of any port shall be notified in writing by the owner or consignee of any vessel or vehicle, arriving from any foreign port, of a lien for freight on any merchandise imported in such vessel or vehicle, and remaining in his custody, such officer may refuse the delivery of such merchandise from any public or bonded warehouse, or other place in which the same shall be deposited, until proof to his satisfaction shall be produced that the freight due thereon has been paid or secured.” * * *

It seems that the Treasury Department has given to this section a construction which denies to the owner or consignee a lien for freight on merchandise imported for exportation.

Article 309, Customs Regulations, 1892. provides:

* * * * *

“Nor can liens be recognized for freight on merchandise intended for export.”

A construction given in such solemn form by the Treasury Department, and continuously acted upon for a long time, is entitled to great respect and consideration.

Section 2989, Revised Statutes, provides:

“The Secretary of the Treasury may from time to time establish such rules and regulations, not inconsistent with law, for the due execution of the provisions of this chapter, and to secure a just accountability under the same, as he may deem to be expedient and necessary.”

The chapter referred to is that on The Bond and Warehouse System, within which are embraced all the provisions which apply to the matter in hand.

The question for consideration is, Is the regulation referred to “inconsistent with law”?

The chapter appears to intend and provide for three classes of imported merchandise, viz, that imported for consump-

Lien on Merchandise Imported for Exportation.

tion, that imported for exportation, and that imported for transportation.

With that class imported for consumption we have here nothing to do. As to the other two classes, it is provided by section 2971, Revised Statutes, that—

“All merchandise which may be deposited in public store or bonded warehouse may be withdrawn by the owner for exportation to foreign countries, or may be transshipped to any port of the Pacific or western coast of the United States at any time before the expiration of three years from the date of original importation, *such goods on arrival at a Pacific or western port to be subject to the same rules and regulations as if originally imported there.*”

And the distinction between the two classes is also recognized by the statute (secs. 2990, 2994, and 3005), by the Treasury Department (Customs Regulations, arts. 568–590), and by this Department (16 Opin., 74).

All merchandise imported into the United States and unloaded at any port passes into the custody of the officer of customs at such port, whether it be unloaded for consumption, transportation, or exportation.

Section 2981, Revised Statutes, provides that the owner or consignee of *any* vessel or vehicle arriving from *any* foreign port may notify the officer of customs of *any* port of a lien for freight on *any* merchandise imported in such vessel and remaining in his custody, and that such officer may refuse the delivery of such merchandise until the freight due thereon has been paid.

This may perhaps be limited as to certain classes of goods for transportation under section 2971, Revised Statutes, but I have been unable to discover any provision of statute which restrains its application from merchandise imported for exportation, nor do I perceive any reason why it should be so restrained. It is difficult to see how the owner of the vessel in which the merchandise is imported can be secured as to the freight due thereon except by such a lien as appears to me to be provided by section 2981.

I am of opinion that so much of article 302, Customs Regulations, as provides: “Nor can liens be recognized for freight on merchandise intended for export” is inconsistent with

Navigable Waters of the United States.

section 2981, Revised Statutes, as amended; and that the owner or consignee of such vessel is entitled to a lien for freight.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

NAVIGABLE WATERS OF THE UNITED STATES.

The St. Louis and Cloquet rivers are navigable waters of the United States, and the Secretary of War had authority to authorize their obstruction by dams, but can not revoke his permit when large expenditures have been made on the faith thereof. (20 Opin., 713, reaffirmed.)

DEPARTMENT OF JUSTICE,

June 25, 1894.

SIR: I have yours of the 12th instant, with accompanying papers.

A permit having been granted to the Altamonte Water Company to construct dams across the St. Louis and Cloquet rivers, in accordance with the opinion of the Attorney-General of February 9, 1894, a reconsideration of the matter is now suggested, and the following questions are submitted:

1. Are the St. Louis and Cloquet rivers, or either of them, navigable waters of the United States?
2. Has the Secretary of War jurisdiction to grant permission to obstruct such rivers, or either of them?
3. The permission to so obstruct said rivers having been granted, can such permission be revoked by the Secretary of War under the existing circumstances of this case?

The first two questions may be advantageously considered together.

It does not seem to be open to reasonable doubt that upon the evidence disclosed by the papers the St. Louis and Cloquet rivers are navigable waters of the United States within the definition of such navigable waters repeatedly given by the Supreme Court of the United States. Nor, being navigable waters of the United States, can I see room for question respecting the complete and exclusive authority of the Secretary of War to permit their obstruction by dams.

Navigable Waters of the United States.

Such authority is expressly given by the first clause of section 7 of the act of September 19, 1890 (26 Stat., 54), as amended by section 3 of the act of July 13, 1892 (27 Stat., 110).

If this clause stood by itself its meaning and effect, as above stated, would be deemed too plain for discussion. If its meaning and effect are now doubtful, the doubt is occasioned by certain subsequent clauses of the same section, and especially by the concluding proviso, which declares that the section shall "not be so construed as to authorize the construction of any bridge, drawbridge, bridge piers and abutments, or other works under an act of the legislature of any State over or in any stream, port, roadstead, haven, or harbor, or other navigable water not wholly within the limits of such State." It may be admitted that the entire act is infelicitously, not to say clumsily, drawn, and that the proviso just cited is the most obscure and unfortunate portion of it. Nevertheless, when the general scope and tenor of the whole statute are considered in connection with its main purpose, and in view of the facts to which Congress must have meant it to apply, the difficulties attending its interpretation largely disappear and leave a tolerably intelligible and consistent piece of legislation.

The main object of Congress in the statute is clear. It intended that the navigable waters of the United States should thereafter be under the exclusive control of the United States; that for the future their navigability should be interfered with by bridges, dams, or other obstructions only by express permission of the United States, granted through its agent, the Secretary of War. That is the plain meaning and operation of the first clause of the amended section 7, already referred to. The same unmistakable purpose is manifested by that clause of section 7 which immediately precedes the proviso, and which declares that it shall not be lawful hereafter to "excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War." This clause and the first clause of the section cover the whole subject, the one apply-

Navigable Waters of the United States.

ing to structures in navigable waters of the United States, the other to excavating, filling, or other disturbance of such waters. As structures are not to be erected without the permission of the Secretary of War, so any excavation, filling, etc., must be approved and authorized by him. Thus the determination of Congress that, as a general proposition, the United States shall take and hold jurisdiction over its navigable waters, which should be complete and exclusive of all interference with them from any other quarter, is too plainly and industriously declared to admit of any real question.

But while the main intent and object of this statute (sec. 7) must be deemed to be as above stated, it is equally plain that Congress realized that it was not dealing with a new and untouched subject-matter. It recognized the fact that for many years almost every State of the Union had been exercising control over the navigable waters of the United States within its limits; that it had been doing so with the tacit assent of Congress, and that in reliance upon the validity of such State action individuals and corporations had invested vast sums of money in bridges and other permanent structures which could not be dealt with as nuisances without the most injurious consequences to both public and private interests. It recognized the additional fact that when the statute should become a law many State grants or licenses for structures in navigable waters of the United States would be found to be outstanding under which work had not as yet been begun by the grantees or licensees. Under these circumstances, with the desire of avoiding unnecessary injury to any public interests and of doing no injustice to private interests concerned, and aiming to treat bona fide State legislation and action with becoming courtesy, Congress qualified the general assumption by the statute of complete and exclusive jurisdiction by the United States over its navigable waters in two important particulars. In the first place, to protect public and private interests in bridges, piers, etc., which were already accomplished facts, the statute is made to declare that it shall not apply to them at all. In the second place, to treat State grants and licenses for structures already conferred but not acted upon with respect, and at

Navigable Waters of the United States.

the same time not lose all control over the subject, the statute is made to declare that construction is not to begin under such grants or licenses until the location and plan of each structure is approved by the Secretary of War.

If the foregoing views are correct the statute in question, first, puts all navigable waters of the United States within the full and exclusive control of the United States; second, excepts from the statute certain existing structures, like bridges, piers, etc., and third, excepts from the statute bridges, piers, etc., already authorized by State authority, but not constructed, so far as to provide that construction shall not begin until the location and plan of work have been approved by the Secretary of War. There remains for consideration only the concluding proviso of section 7, already quoted, the meaning and effect of which, if the foregoing exposition of the statute can be relied upon, would seem to be tolerably clear. It will be observed that the subject of this proviso is to exclude a possible construction of the section. It is not to "be so construed as to authorize," etc. Now, what possible construction of the statute was Congress guarding against? It is not difficult to see. In the previous portions of the statute Congress had recognized the validity of State action respecting the navigable waters of the United States in two classes of cases, one class being that of existing structures, the other that of certain structures not existing, but authorized by the State.

Having thus recognized State authority in these two classes of cases, Congress inserted this proviso, by way of excessive precaution, perhaps, but to make sure that such recognition could not be used to cover any other than the two specifically defined and excepted classes of cases. It meant in particular to dispose of the contention that, after the statute and notwithstanding the statute, it was still competent for a State to license a bridge, pier, or other like structure in navigable waters of the United States, subject only to the approval of the location and plan of the work by the Secretary of War. It meant to make that contention impossible, to make it certain that, except in the two classes of cases named, the jurisdiction of the United States should be complete and wholly exclude any State jurisdiction. To



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make this purpose the more manifest the proviso is so phrased as to indicate just what waters would or might be under the jurisdiction of a State after the passage of the statute. Throughout all the preceding portions of the statute the waters dealt with are "navigable waters of the United States." In this proviso the waters dealt with are waters "wholly within the limits of" a State. The distinction is not accidental or insignificant. It was meant to draw the line between the waters over which, with certain exceptions, the statute meant to assert exclusive jurisdiction in the United States, and other waters over which the statute meant to leave the jurisdiction of the State unquestioned, if not finally and forever, at least for the time being.

I see no occasion, therefore, for modifying the opinion already given by me under date of the 9th of February last.

The remaining, question, whether the permit granted February 13, 1894, can, under the existing circumstances of this case, be revoked, is more easily answered. It does not involve the issue whether the power to rescind a permit is a necessarily implied element of the power to grant it, or whether, all the circumstances remaining the same, the Secretary of War, after granting a permit, might cancel it because of a change of mind as to the wisdom or propriety of his original action. Upon the facts appearing in the papers submitted the circumstances are not unchanged, but on the faith of the permit the Altamonte Water Company has gone forward and made contracts, spent large sums of money, and otherwise materially altered its situation. Under such circumstances, I am of the opinion that the Secretary of War is not now at liberty to revoke the permit.

I return herewith the papers accompanying your letter, and am,

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF WAR.

Navy Department—Precedence of Officers.

NAVY DEPARTMENT—PRECEDENCE OF OFFICERS.

Article 21 of the Navy Regulations is within the authority conferred upon the Secretary of the Navy by Revised Statutes, section 1547.

There is no inconsistency between sections 1483 and 1484, Revised Statutes, in their operation upon the question of the precedence of Engineer officers of the Navy.

A rule for ascertaining the date of precedence of officers on the active list of the Navy held to be in conflict with the act approved August 5, 1882. (22 Stat., 284.)

Status of members of the staff corps is governed by Revised Statutes, sections 1485, 1486, and 1487.

DEPARTMENT OF JUSTICE,

June 28, 1894.

SIR: Your letter of the 22d instant, with that of C. W. Rae, Chief Engineer, U. S. Navy, head of Department of Steam Engineering, presents for my consideration and opinion three questions arising out of the state of facts disclosed in these letters.

"1. Whether or not the present practice of the Department in assigning to graduates of the Naval Academy dates of precedence according to the rules fixed by the 'Febiger Board,' as herein set forth, is warranted by law.

"2. Whether the provisions of article 21 of the Navy Regulations are within the authority conferred upon the Secretary of the Navy by section 1547 of the Revised Statutes.

"3. To what extent, if at all, are the provisions of section 1483 of the Revised Statutes (act of 23d of May, 1872) that graduates of the Naval Academy shall take rank according to their proficiency as shown by their order of merit at the date of graduation, modified by section 1484 of the Revised Statutes (act of 3d of March, 1873), providing that engineer officers graduated at the Naval Academy shall take precedence with all other officers with whom they have relative rank according to the actual length of service in the Navy."

The provisions of the statutes relating to the subject-matter of these inquiries are as follows:

"SEC. 1467. Line officers shall take rank in each grade according to the dates of their commissions.

"SEC. 1483. Graduates of the Naval Academy shall take rank according to their proficiency as shown by their order of merit at the date of graduation.

Navy Department—Precedence of Officers.

"SEC. 1484. Engineer officers graduated at the Naval Academy shall take precedence with all other officers with whom they have relative rank, according to the actual length of service in the Navy.

"SEC. 1485. The officers of the staff corps of the Navy shall take precedence in their several corps, and in their several grades, and with officers of the line with whom they hold relative rank, according to length of service in the Navy.

"SEC. 1486. In estimating the length of service for such purpose, the several officers of the staff corps shall, respectively, take precedence in their several grades and with those officers of the line of the Navy with whom they hold relative rank who have been in the naval service six years longer than such officers of said staff corps have been in said service; and officers who have been advanced or lost numbers on the Naval Register shall be considered as having gained or lost length of service accordingly.

"SEC. 1487. No staff officer shall, in virtue of his relative rank or precedence, have any additional right to quarters."

The orders, regulations, and instructions issued by the Secretary of the Navy, with the approval of the President, for the government of the Navy, have the force of the statute law when not inconsistent therewith. (6 Opin., 10; 13 Opin., 9; *United States v. Symonds*, 120 U. S., 46.)

The commissioned officers of the Navy are either of the line or of the staff. The rank, grade, and order of precedence of the officers of the Navy are prescribed by the statute law and the Naval Regulations.

Article 21 of the Naval Regulations, 1893, provides:

"The precedence of officers of the staff in their several corps and in their several grades and with officers of the line with whom they hold relative rank * * * shall be regulated by the precedence list published in the Navy Register. * * * In all cases where commissioned officers of different corps have the same date of precedence, they shall take rank as follows:

- "1. Line officers.
- "2. Medical officers.
- "3. Pay officers.
- "4. Engineer officers."

Navy Department—Precedence of Officers.

* * * * *

Graduates of the Naval Academy are appointed and commissioned—

“To fill vacancies in the lower grades of the line and Engineer Corps of the Navy and of the Marine Corps: *Provided*, That no greater number of appointments into these grades shall be made each year than shall equal the number of vacancies which has occurred in the same grades during the preceding year; such appointments to be made from the graduates of the year * * * in the order of merit.” (22 Stat., 285.)

It must happen, then, that graduates of the same class receive their commissions as officers in the Navy at widely different dates; and section 1467 provides as to line officers that they take rank in each grade according to the date of their commissions.

The rule proposed by the “Febiger Board” for ascertaining the date of precedence of officers on the active list of the Navy and adopted by the Department is stated by you to be as follows:

“That the date of entry of the member of a class longest in the service shall apply to him and to all who passed above him at graduation; that the date of entry of the member of the remainder of the class longest in the service shall apply to him and all above him, and to all above him not placed by the first date, and so on through the class.”

As thus formulated the rule is obscure and barely intelligible. If it intends that in each class of graduates from the Naval Academy the “date of precedence” of the members of such class shall be determined by ascertaining the member having the earliest date of admission to the Academy and imputing that date of admission to every other member who stands above him in the class, and then taking the member below him who has the next earliest date of admission and imputing that date to all who stand above him but below the first date, and so on down in that order, but preserving to the members of each date their relative class standing in the order of merit, I do not perceive that the rule involves any inconsistency with the requirements of the statutes that were in operation at the date of its adoption,

Navy Department—Precedence of Officers.

but it is in conflict with the act approved August 5, 1882. (22 Stat., 284).

As to the members of the staff corps of the Navy, their status appears to be quite clearly defined by sections 1485, 1486, and 1487 of the Revised Statutes, and particularly as to Engineer officers whose precedence is prescribed by section 1484, which operates as an exception to 1486. (15 Opin., 336.)

I do not perceive any inconsistency between sections 1483 and 1484 in their operation upon the question of the precedence of Engineer officers of the Navy.

Just what is meant by the term "graduates of the Naval Academy" was considered by Solicitor-General Phillips in an instructive opinion (15 Opin., 637), to which I beg leave to refer.

Section 1483 relates to graduates generally from the Naval Academy, and prescribes the "order of merit" as the scale of precedence.

Section 1484 relates to a restricted and peculiar body of "graduates," who are eligible to only one corps of the Naval service, to wit, the staff, and to the engineer department only of that corps.

By act approved March 2, 1889 (25 Stat., 878), the academic board of the Naval Academy was required—

"To separate the first class of naval cadets then commencing their fourth year into two divisions, as they may have shown special aptitude for the duties of the respective corps, in the proportion which the aggregate number of vacancies occurring in the preceding fiscal year, ending on the 30th day of June, in the lowest grades of commissioned officers of the line of the Navy and the Marine Corps of the Navy shall bear to the number of vacancies to be supplied from the Academy occurring during the same period in the lowest grade of commissioned officers of the Engineer Corps of the Navy; and the cadets so assigned to the line and Marine Corps division of the first class shall thereafter pursue a course of study arranged to fit them for service in the line of the Navy, and the cadets so assigned to the Engineer Corps division of the first class shall thereafter pursue a course of study arranged to fit them for service in the Engineer Corps of the Navy, * * * ; and from the final

Compromise of Judgment Indebtedness.

graduates from the line and Marine Corps division, appointments shall be made hereafter as it shall be necessary to fill vacancies in the lowest grades of commissioned officers of the line of the Navy and Marine Corps; and the vacancies in the lowest grades of the commissioned officers of the Engineer Corps of the Navy shall be filled in like manner by appointments from the final graduates of the Engineer Division." * * *

Article 21 of the U. S. Naval Regulations is within the authority conferred upon the Secretary of the Navy by section 1547, Revised Statutes, inasmuch as it does not appear to be in conflict with any provision of the statute law relating to the relative rank of line and staff officers in the Navy.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

COMPROMISE OF JUDGMENT INDEBTEDNESS.

Revised Statutes, section 3469, does not confer power to remit or release any portion of a judgment indebtedness on considerations of hardship to particular individuals. The authority to "compromise" relates to claims of doubtful recovery or enforcement. (13 Opin., 479, and 18 Opin., 72, distinguished.)

DEPARTMENT OF JUSTICE,

July 11, 1894.

SIR: Your communication of the 7th instant to the Attorney-General presents a case in which the Supreme Court of the United States, in a proceeding under Revised Statutes, section 3207, has adjudged (*United States v. Snyder*, 149 U. S., 210) that for certain internal-revenue taxes assessed against one Snyder, the United States have a lien upon real estate in the city of New Orleans now owned by the International Cotton Press Company, which that company bought from Snyder after the lien had attached. The amount of the taxes is \$3,463.29, with considerable interest. The International Cotton Press Company submits an offer to pay \$50, together with all costs and expenses, in consideration of a

Compromise of Judgment Indebtedness.

release of the lien, and the U. S. district attorney and the Solicitor of the Treasury recommended the acceptance of the proposition. You ask whether you can legally approve the proposed compromise under Revised Statutes, section 3469.

The petition for settlement and the recommendations in support thereof are not based upon doubts as to the possibility of realizing the amount of the tax out of the property, but upon the ground of the hardship to the company supposed to be involved in enforcing against it the laws of the United States as interpreted by the Supreme Court in a proceeding to which the company was a party.

I am of the opinion that section 3469 has no application to such a case. It provides that—

“Upon a report by a district attorney, or any special attorney or agent having charge of any *claim* in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the Solicitor of the Treasury, the Secretary of the Treasury is authorized to *compromise* such claim accordingly. But the provisions of this section shall not apply to any claim arising under the postal laws.”

The section does not authorize the Secretary of the Treasury to remit or release moneys due to the United States and clearly recoverable, but to “compromise,” which implies a claim of doubtful recovery or enforcement.

In the case which you submit there is nothing to “compromise,” for the right of recovery and the amount have been finally adjudged by the court of last resort, and the property is said to be sufficient to satisfy the debt.

These views are not in conflict with the opinion to which I have been referred, given to the Secretary of the Treasury on November 13, 1884, by Mr. Solicitor-General Phillips (18 Opin., 72), for that was the case of a claim with respect to which, although it had been reduced to judgment, there was, to use the language of the opinion, “doubt whether anything more could be made;” nor with the opinion of Mr. Attorney-

Inspection of Steamships—Expired Certificates.

General Akerman (13 Opin., 479), which seems to relate to a judgment open to be reviewed, and not to the final judgment of a court of last resort.

Respectfully,

LAWRENCE MAXWELL, JR.,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

RICHARD OLNEY.

INSPECTION OF STEAMSHIPS—EXPIRED CERTIFICATES.

The regulations provided by title 52 of the Revised Statutes do not apply to American steam vessels whilst engaged in commerce beyond the jurisdiction of the United States.

Expired inspection certificates can not be extended by consular officers of the United States; and there is no authority of law for sending local inspectors out of the country to make inspection.

DEPARTMENT OF JUSTICE,

July 17, 1894.

SIR: I have your letter of July 14, 1894, submitting for my "consideration and opinion the following questions regarding the application of the U. S. steamboat laws (title 52, Rev. Stat.) to American steam vessels, originally inspected under those laws in a port of the United States, whose inspection certificates have expired by limitation whilst the steamers are engaged in commerce between foreign ports outside the jurisdiction of the United States, and which steamers are likely to remain beyond such jurisdiction for an indefinite period."

The question to be considered being, "Whether such steamers running on expired certificates of inspection outside the territory of the United States are liable to the penalties provided in title 52 for violation of the provisions of that title."

And, "Whether under the diplomatic or consular laws of the United States there is any authority for such officers to extend inspection certificates granted by United States inspectors of steam vessels to American steamers," etc.

Inspection of Steamships—Expired Certificates.

And, "As to the legality of sending local inspectors to Panama to inspect the vessels referred to," etc.

Section 4400 of title 52, Revised Statutes, provides:

"All steam vessels navigating any waters of the United States which are common highways of commerce, or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats, propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this title."

As all of your questions relate to "steamers engaged in commerce between foreign ports *outside the jurisdiction of the United States*, and which are likely to remain beyond such jurisdiction for an indefinite period," it is obvious that they do not fall within the class to which title 52, Revised Statutes, applies; and it is difficult to see how, whilst they "remain beyond the jurisdiction of the United States and engaged in commerce between foreign ports outside such jurisdiction," the laws of the United States for the regulation of steam vessels can be made to apply to or be enforced against them.

I am of opinion that such steam vessels, whilst so engaged in commerce beyond the jurisdiction of the United States, are not subject to the regulations provided by title 52 of the Revised Statutes, and that there is no authority of law for consular officers of the United States "to extend inspection certificates granted by the United States inspectors of steam vessels to American steamers;" and that there is no authority of law for "sending local inspectors to Panama to inspect the steam vessels referred to."

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF TREASURY.

Military Equipments—Right of Control.

MILITARY EQUIPMENTS—RIGHT OF CONTROL.

The opinion expressed that certain arms furnished the Washington Light Infantry, of Charleston, S. C., are held by the State of South Carolina for the use of the whole body of the militia of that State in such manner and in accordance with such rules and regulations as the proper authorities of the State may prescribe.

DEPARTMENT OF JUSTICE,
July 25, 1894.

SIR: I have the honor to acknowledge yours of the 23d instant, in which my opinion is requested upon two questions presented in a letter of the attorney-general of the State of South Carolina of the 22d instant.

The facts as there stated are that under a joint resolution of April 27, 1876 (Stat. L., vol. 19, p. 212), certain arms and accouterments were loaned by the United States to the Washington Light Infantry, of Charleston, S. C., and that under joint resolution of March 9, 1878 (20 Stat. L., p. 248), 120 of these rifles and other accouterments were charged to the State of South Carolina on its quota, upon the written approval of the government of the said State, for the use of said Washington Light Infantry.

The inquiries made are:

“(1) Are these arms the property of the Washington Light Infantry or have they any right derived from the laws of the United States to said arms over and above any other particular militia of the State of South Carolina?

“(2) Are these arms not to be considered as devoted to the general purposes of the militia of the State of South Carolina, and as between the said Washington Light Infantry and the State of South Carolina are they not subject to such disposition as the rules, regulations, and commands of the general militia may require?”

It is exceedingly doubtful whether I can rightfully give any opinion as requested, the arms referred to having been absolutely and finally delivered by the United States, so that the inquiries above stated relate to the effect of an act already done by the War Department, rather than raise any question of present administration. Without passing upon that point,

Seeds—Purchase—Construction of Statute.

however, which I mention only that it may not seem to have escaped notice, I answer the inquiries propounded by saying that, in my judgment, the arms in question are held by the State of South Carolina for the use of the whole body of the militia of that State in such manner and in accordance with such rules and regulations as the proper authorities of the State may prescribe.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

SEEDS—PURCHASE—CONSTRUCTION OF STATUTE.

The act making appropriations for the Department of Agriculture for the fiscal year 1895 does not authorize the purchase of any other than seeds described in Revised Statutes, section 527.

Repeals of statutes by implication are not favored.

DEPARTMENT OF JUSTICE,

August 15, 1894.

SIR: I have the honor to acknowledge yours of the 14th instant, in which you ask my opinion upon the question whether the act making appropriations for the Department of Agriculture for the fiscal year 1895 enables the Secretary of that Department to purchase any other than seeds described in section 527 of the Revised Statutes, to wit, seeds "rare and uncommon to the country or such as can be made more profitable by frequent changes from one part of our country to another."

I have no hesitation in answering the question in the negative. Repeals of statutes by implication are not favored, and are held to have taken place only when the provisions of the former and latter statutes are irreconcilable and can not have been intended to be operative at the same time. In the present instance not only is there nothing in the appropriation act for 1895 necessarily inconsistent with the terms of section 527 of the Revised Statutes, but the language of the former is "For the purchase, propagation, and

 Naval Supplies—Contracts—Withdrawing Bid.

distribution, as *required by law*," etc. Here is an express reference to prior legislation on the subject, which makes it part of the appropriation act as clearly and certainly as if bodily incorporated.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF AGRICULTURE.

 NAVAL SUPPLIES—CONTRACTS—WITHDRAWING BID.

The Secretary of the Navy is obliged to give contracts for supplies to the lowest bidder who fills the requirements as to security, etc., although the Secretary is the person charged with the duty of ascertaining the facts in this regard, and his decision is not reviewable in any court.

In the absence of any special statutory provision to the contrary, a bidder for a Government contract may withdraw his bid at any time until notice of acceptance.

Whether there is any such special statutory provision relating to the Navy Department? *Qæure.*

DEPARTMENT OF JUSTICE,

August 31, 1894.

SIR: Your communication of August 28 states the following facts: You advertised for sealed proposals for supplying certain chain cables for the use of the Navy, which proposals were opened, by the terms of the advertisement, on August 21 last. The lowest bidder was one Neville. Before receiving notice of acceptance, however, he withdrew his proposal on August 25. You ask an official opinion as to whether you have the right to release him, or may and must hold him to his offer.

You are required by statute, when time will permit, to procure supplies only by the method adopted in this case, namely, by advertising a certain length of time for sealed proposals, and opening the proposals at a specified time in the presence of all bidders desiring to attend. You are required to award the contract for such supplies to the lowest bidder who gives satisfactory security and whose pro-

Naval Supplies—Contracts—Withdrawing Bid.

posal shall be accompanied by the guaranty prescribed by the statute. (Rev. Stat., secs. 3709, 3710, 3718, 3719, 3722.) You may also refuse to accept bids for other reasons, as for the bad record of the bidder or his guarantor, or excessive price demanded. (Rev. Stat., secs. 3722, 3724.)

You have, therefore, no arbitrary right of selection, like a private person to whom an offer is made. The lowest bidder who fills the other requirements is entitled to an award of the contract, although you are the person charged to ascertain the facts in this regard, and your decision is not reviewable by any court. Under these circumstances the suggestion is made that the law really accepts the lowest competent bid at the moment the sealed proposals are opened, so that on correct analysis it is the advertisement which corresponds to the common-law offer, and the bid which corresponds to the common-law acceptance; and therefore that the bidder can not thereafter assert the common-law right to withdraw an unaccepted offer. Such a ruling would avoid gross abuses. (*Twiss v. City of Port Huron*, 63 Mich., 528, 531.) The rulings of this Department, however, in the absence of any special statutory provision, are that the bidder may withdraw at any moment until notice of acceptance of his bid. (9 Opin., 174; 15 Opin., 648, 651.)

A special statute relating to bids in your Department requires that "each proposal shall be accompanied by a written guaranty * * * that the bidder, if his bid is accepted, will * * * give bond with good and sufficient sureties to furnish the supplies proposed." (Rev. Stat., sec. 3719.) Strictly construed, this does not prevent a withdrawal before acceptance. Liberally construed, in conformity with the manifest intent of the provision, I think it may fairly be held that it binds the bidder to stand by his bid, at least after the hour of opening. The case being doubtful, I am inclined to give a liberal construction to the statute, since in this way only can its authoritative construction be obtained from the courts. I would therefore advise that Mr. Neville be held to his proposal, and that no right of withdrawal on his part be recognized, but that he and his guarantors be held responsible.

Attorney-General—Civil Service—Residence.

You further ask whether it is your duty to award the contract to the next lowest bidder. I would answer that it is not necessarily so. The next lowest bidder may, for instance, have bid too high. (Rev. Stat., sec. 3724; see sec. 3719.)

Very respectfully,

EDWARD B. WHITNEY,

Acting Attorney-General.

The SECRETARY OF THE NAVY.

ATTORNEY-GENERAL—CIVIL SERVICE—RESIDENCE.

Opinion of June 8, 1894 (*supra*, p. 33), will not be reconsidered for the purpose of passing upon new and conflicting evidence. The credibility of witnesses and the weight of evidence are not questions to be considered in rendering an opinion.

DEPARTMENT OF JUSTICE,

September 12, 1894.

SIR: I have the honor to acknowledge receipt, by reference from you, of communication of July 20, 1894, from John R. Procter and Charles Lyman, requesting further consideration and opinion as to residence of Edward D. Morrill, to be based upon new and additional evidence accompanying such request.

I am not at liberty to comply with such request, as it would involve consideration and decision upon conflicting evidence. The former opinion was based upon Morrill's own declarations as a statement of fact. He now seeks to change the conclusion reached by stating in his own affidavit, in some measure supported by others, a new fact, namely, a mental purpose.

Morrill having established Chattanooga, Tenn., as his legal residence in November, 1888, by voting there, now states (affidavit of July 16, 1894) that in November, 1889, he returned to Camden, Ala., "with the full intention of making that his future home, or rather of resuming his former domicile," while in his affidavit of July 31, 1894, purporting to state all facts relevant to his acts and intentions on question of residence, he declares that on November 21, 1889, he returned to Camden, Ala., and "stayed in my own home and made preparations to come to Washington."

Hydrographic Office—Purchase of Supplies.

This brings up for consideration the weight to be given to the affidavit of the person to be benefited in proving a purpose to adopt a new residence, when such affiant appears in the same record to have sworn differently on the same question, and to have sworn in his application in 1890 to continuous legal residence in Camden, Ala., since 1866, notwithstanding the fact, now admitted by him, that Chattanooga, Tenn., had been his legal residence for at least a year prior to November, 1888.

Weight of evidence and credibility of such witnesses are not questions to be considered by me on application for an opinion.

Very respectfully,

HOLMES CONRAD,
Acting Attorney-General.

The PRESIDENT.

HYDROGRAPHIC OFFICE—PURCHASE OF SUPPLIES.

All purchases and contracts for supplies in any of the Departments of the Government must be made by advertisement unless immediate delivery is necessary.

The first two sentences of section 3709, Revised Statutes, as amended by the acts of January 27, chapter 22, and April 21, 1894, chapter 61, apply to purchases anywhere in the United States. The remaining three sentences apply only to purchases in the city of Washington.

The word "miscellaneous," in the urgent deficiency act of April 21, 1894, section 2, must be restricted to that class of commodities which must be purchased on a considerable scale and used alike by many or all of the various Departments and Government establishments in the city of Washington.

DEPARTMENT OF JUSTICE,
September 22, 1894.

SIR: Your communication of September 11 asks my opinion as to the method which you should pursue in procuring certain drawing, engraving, and chart printing supplies required for the use of the Hydrographic Office in your Department. The schedule which you inclose, enumerating the articles to be purchased, shows them to be very varied in character, including paper, pencils, pens, water colors of different descriptions, with curves, dividers, gauges, and triangles, together with brushes, sponges, cloths, tacks, acids, and

Hydrographic Office—Purchase of Supplies.

other chemicals, etc. You ask me whether these supplies fall within the provisions of section 3709 of the Revised Statutes or the acts amendatory thereof.

Section 3709 requires that "*all* purchases and contracts for supplies * * * in any of the Departments of the Government" shall be made by advertisement "when the public exigencies do not require the immediate delivery of the articles." Hence it is necessary for you to obtain these supplies, like all others, by advertisement unless immediate delivery is necessary.

It remains to be considered whether these supplies must be advertised for and the proposals therefor considered under the provisions of the amendatory act of January 27, 1894. That act added to section 3709 three sentences by way of amendment, providing that the advertisements for supplies should be made by all the Departments on the same days, that proposals should be opened on the same days, and that they should be submitted for examination to a special board consisting of one Assistant Secretary of the Treasury, one Assistant Secretary of the Interior, and one Assistant Postmaster-General.

Section 3709 being applicable to all purchases of supplies, whether made in Washington or elsewhere, this amendatory act had at first the same wide application. That was not, however, its intention. Hence the oversight was corrected by section 2 of the urgent deficiency act of April 21, 1894. That section restricts the application of the act of January 27 to advertisements for proposals for "fuel, ice, stationery, and other miscellaneous supplies, to be purchased at Washington for the use of the Executive Departments and other Government establishments therein named." No such restriction, however, was imposed upon the original provisions of section 3709. Hence that section in its present form must receive an anomalous construction. Its first two sentences apply to purchases anywhere in the United States, while the remaining three sentences apply only to purchases in this city.

This geographical restriction, as I have said, was the main object of the statute of April. That statute, however, imposed a still further restriction upon the operation of the

Hydrographic Office—Purchase of Supplies.

three sentences added in January. The original portion of section 3709 relates to all "supplies." The last three sentences, however, now apply only to "fuel, ice, stationery, and other miscellaneous supplies."

Whether you are obliged to advertise in the present instance under the act of January depends on whether the supplies you now desire are covered by this phraseology. I could not undertake to decide that question as a pure matter of law in the case of each of the one hundred and twenty-two items in your schedule, even were I acquainted with all the relevant facts bearing upon each article. Congress has spoken in very general language, which necessarily and wisely, and perhaps intentionally, leaves much to the Executive Departments themselves in the interpretation of the act. I can only indicate the general principles governing the application of the statute of April, leaving its application in matters of detail to the heads of the various Departments in consultation with the members of the examining board, who, through special knowledge and experience, are much better qualified than myself in this regard.

The definitions of "fuel" and "ice" are unnecessary here to consider. The word "stationery" has no special legal definition. It is defined in the Century Dictionary as follows: "The articles usually sold by stationers; the various materials employed in writing, such as paper, pens, pencils, and ink." Webster defines it as follows: "The articles usually sold by stationers, as paper, pens, ink, quills, blank books, etc." Whether the articles required by them are usually sold by stationers is a matter concerning which your employés in the Hydrographic Office can doubtless afford full information. I am not sufficiently informed to be able to advise as matter of law whether or not there may be varieties of paper, pens, pencils, etc., which are not classifiable as "stationery."

The word "miscellaneous" in this statute is still more difficult to construe. It evidently does not include all supplies, for this would make the whole provision entirely unnecessary. Congress must be presumed to have inserted it for some reason. A practical definition of the word can only be obtained by applying the rule *noscitur a sociis*. Fuel, ice, and stationery are staples required by every Department

Hydraulic Mining.

and every branch of the service. The word "miscellaneous" must be restricted to other supplies of the same general nature; in other words, to that class of commodities which must be purchased on a considerable scale and used alike by many or all of the various Departments and Government establishments in this city. This conclusion is strengthened by the fact that proposals are submitted to a board containing one representative from each of the three Departments that require these staple commodities in the largest amount. It is natural to provide that high officers of the Treasury, Interior, and Post-Office Departments should superintend the purchase of these staples, not only for their own Departments, but for the other Departments and establishments as well. It is less natural that they should be designated to negotiate the purchase of articles required for scientific or technical work of your Department, of the Department of Agriculture, of the U. S. Fish Commission, or the Smithsonian Institution. It is well known, moreover, that the main object of the statute of January was to equalize, at the lowest possible price, the prices paid by the different Departments for the supplies common to all; it having been cause for remark that the rates obtained by the various Departments had greatly varied in the past.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

HYDRAULIC MINING.

The North Bloomfield Gravel Mining Company, of California, is within the jurisdiction of the California Débris Commission. (53 Fed. Rep., 625, considered.)

Resort may be had to a court of equity to compel allowance of inspection of premises where hydraulic mining is being, or is supposed to be, unlawfully conducted.

DEPARTMENT OF JUSTICE,

September 24, 1894.

SIR: I have the honor to acknowledge the receipt of the letter of the Acting Secretary of War, inquiring whether or not the North Bloomfield Gravel Mining Company, of Cali-

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fornia, falls within the jurisdiction of the California Débris Commission, under the act of Congress approved March 1, 1893, and entitled "An act to create the California Débris Commission and regulate hydraulic mining in the State of California;" and inquiring also whether, in view of the fact that the said mining company has never made application to the said Commission for license to operate, as required by the terms of said act, the Commission has "authority to enter upon the premises for the purpose of inspecting or supervising the operation of the mine, or performing any of the duties devolved by the said act upon the Commission in respect thereto; and, if it has that authority and is forbidden by the said company to enter upon its premises for that purpose, by what means can the Commission enforce its said authority?"

In reply I beg to state that in my opinion there is no reason whatever why the company mentioned should not come equally with any other company or individual engaged in hydraulic mining within the jurisdiction and under the authority of the Commission. The claim of the company that, under the decision of the circuit court of the United States for the northern district of California, in the case of *The United States v. The Same Company* (53 Fed. Rep., 625), dated October 5, 1892, the defendant was removed beyond the provision and operation of the law creating the Commission I deem utterly untenable. At the time of the trial and decision of the case mentioned that law was not in existence; consequently it could not have been construed or the extent of its operation defined by the court. Moreover, the decision referred to was only to the effect that an injunction to restrain hydraulic mining by the defendant should be denied, for the reason that there was not sufficient showing of damage to the navigability of public waters. But, whatever might have been the status of this company prior to the enactment of the débris law, that law has become operative upon it as well as upon all others conducting the business of hydraulic mining; and this company, if engaged in such mining and without license, is doing so in violation of law; for it is provided by section 9 of said act (27 Stat., 508): "That the individual proprietor or proprie-

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tors, or in case of a corporation its manager or agent appointed for that purpose, owning mining ground in the territory in the State of California mentioned in section three hereof, which it is desired to work by the hydraulic process, must file with said Commission a verified petition setting forth such facts as will comply with law and the rules prescribed by said Commission."

The right of the Commission to enter upon the lands of the company where such mining is being, or is supposed to be, unlawfully conducted seems entirely clear under the provisions of section 5 of said act. This section, after directing that the Commission shall make examinations and surveys to determine the practicability, utility, etc., of storage sites for débris, reservoirs, etc., to aid in the improvement and protection of the rivers within its jurisdiction, and to that end, preventing, amongst other matters, the deposit of débris resulting from mining operations, declares that the Commission shall " * * * investigate such hydraulic and other mines as now are or may have been worked by methods intended to restrain the débris and material moved in operating such mines by impounding dams, settling reservoirs, or otherwise, and in general to make such study of and researches in the hydraulic mining industry as science, experience, and engineering skill may suggest as practicable and useful in devising a method or methods whereby such mining may be carried on as aforesaid."

By section 20 of said act it is provided: "That said Commission, or a committee therefrom, or officer of said corps assigned to duty under its orders, shall, whenever deemed necessary, visit said territory and all mines operating under the provisions of this act * * * ." By section 22 of this act hydraulic mining contrary to the provisions of the act to the injury, direct or indirect, of navigable waters is made a misdemeanor, punishable by fine and imprisonment, while by section 5 the power to investigate mines is given in relation to those that "*are now* or may have been" worked. I think that the law intended thus to give to the Commission ample means for ascertaining the method of conduct of the mining industry, with a view to the protection of the navi-

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gable waters concerned and the punishment of violators of the law, and that such means necessarily include the right to enter upon and inspect premises even at the present time.

I am unable to find in the act in question any provision for the enforcement of the right of the Commission to enter upon lands for the examination of mines, and in the absence of such express provision am of the opinion that the preferable course would be the filing of a bill in equity, alleging (amongst other and usual matters) that the company is conducting hydraulic mining without license and without application for license, and, as believed, to the injury of navigation of the streams; that the Commission desire to investigate the method of mining, construction of reservoirs, etc., and to that end have attempted to enter upon the land, but have been denied admittance, the prayer of the bill to be for an injunction to prevent the defendants from preventing the entry of the Commission and for injunction restraining the defendants from mining during the time the Commission is excluded by it and pending the investigation.

Respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

LIFE-SAVING MEDALS.

Section 12 of act of June 18, 1878, chapter 265, does not confer authority upon the Secretary of the Treasury to bestow life-saving medals for signal exertions made in saving persons from drowning in small inland streams, ponds, and pools.

DEPARTMENT OF JUSTICE,

September 26, 1894.

SIR: I have the honor to acknowledge your letter of September 21, from which I understand you to desire my opinion upon the question "whether section 12 of the act of June 18, 1878, entitled 'An act to organize the Life-Saving Service,' authorizes the Secretary of the Treasury to bestow life-saving medals for signal exertions made in saving persons from drowning in small inland streams, ponds, pools;" the term "inland" being used, I take it, to indicate that the

Customs Duties—Manufactures of Wool.

waters referred to are wholly within a State and no part of the navigable waters of the United States.

I am of the opinion that the section referred to does not confer such authority. Its terms are vague and general, but must be construed in connection with other sections of the same act and with other acts relating to the same subject-matter. So construed, the waters contemplated by the section are, in my judgment, either the high seas or what may be described as waters of the United States; that is, waters belonging to the United States as owner, or over which it has jurisdiction by virtue of its authority to regulate interstate and foreign commerce.

Respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

CUSTOMS DUTIES—MANUFACTURES OF WOOL.

The phrase "manufactures of wool" in paragraph 297 of the tariff act of August 27, 1894, does not include manufactures of the hair of any animals other than the sheep.

All doubts arising under said act are presumptively to be resolved in favor of the lower rate of duty, save where the act mentions or describes the same article in two different places, under two different rates, when the higher rate governs.

The phrase in question having been given a restrictive meaning in prior tariff acts, there is a presumption, in the absence of anything to the contrary, that Congress intended it still to have the same meaning.

The titles of the schedules in the tariff act have little significance.

The phrase aforesaid does not include articles partly of wool of which wool is not the component material of chief value.

DEPARTMENT OF JUSTICE,

October 9, 1894.

SIR: The new rates of import duties prescribed by section 1 of the tariff act of August 27, 1894, went into effect immediately, "unless otherwise specially provided for." Paragraph 297 of that act provided that "the reduction of the rates of duty herein provided for manufactures of wool shall take effect January 1, 1895." That paragraph closes Schedule K of the act, whose heading is "Wool, and manufactures of wool." The schedule does not, however, deal with wool

Customs Duties—Manufactures of Wool.

and manufactures of wool alone. It distinguishes repeatedly between "wool, worsted, the hair of the camel, goat, alpaca, or other animals." It includes also certain manufactures of flax and cotton.

You ask my opinion whether paragraph 297 refers solely to merchandise of which wool, the product of the sheep, forms the material, or whether the product of the camel, goat, alpaca, or other animals is equally included.

The general intent of the act was to effect an immediate as well as extensive reduction of duties. To postpone the reduction in the case of any specific article, the article must be brought clearly within some exception to this general intent. All doubts arising under the act are presumptively to be resolved in favor of the lower rate of duty, save where the act mentions or describes the same article in two different places, under two different rates, when the higher rate governs.

"Wool," within dictionary definitions, includes the hair of the alpaca and of the Angora goat; it never is used to include all goat's hair, nor yet camel's hair, cow hair, or horsehair. Throughout Schedule K, except in the heading, it is undoubtedly used so as to exclude even hair of the kinds first mentioned. Moreover, the phrase, "manufactures of wool" has been given a very restrictive meaning in prior tariff acts (*Elliott v. Swartwout*, 10 Pet., 137; *Seeberger v. Cahn*, 137 U. S., 95), and there is a presumption, in the absence of anything to the contrary, that Congress intended it still to have the same signification. (*Maddock v. Magone*, 152 U. S., 368, 371, 372.)

If the heading of Schedule K were intended as an accurate and comprehensive description of its contents, the question would arise whether the heading or the contents should control; and it might be argued that hair, flax, and cotton were all wool. But the heading has little significance. It is intended only for a general suggestion as to the character of the articles within the schedule. (*Hollender v. Magone*, 149 U. S., 586, 591; *Seeberger v. Schlesinger*, 152 U. S., 581, 583.) If the rule of construction were otherwise, then sponges would be either "chemicals, oils, or paints," and cork would be either "flax, hemp, or jute."

Chinese Immigration.

Moreover, it is proper to consider, as an aid to construction, the original form of the bill and the changes made by amendment. The bill as it first passed the House of Representatives, in the same paragraph, with the exception above quoted concerning "manufactures of wool," had further provisions as to "all rates of duty in the woolen schedule." The latter was stricken out in the Senate, but serves to show that the distinction was brought to the attention of Congress.

I am therefore very clearly of the opinion that the word "wool," as used in paragraph 297, refers to hair of the sheep only, and that the new duties upon articles made of the hair of other animals went immediately into effect upon the passage of the act.

You ask also my opinion whether the phrase "manufactures of wool" in that paragraph is applicable to articles of which wool, as so defined, although a component material, is not the material of chief value. I would answer this question in the negative. (*Arthur v. Butterfield*, 125 U. S., 70, 75; *Herrman v. Robertson*, 152 U. S., 521, 524.)

Very respectfully,

LAWRENCE MAXWELL, JR.,

Acting Attorney-General.

The SECRETARY OF THE TREASURY.

CHINESE IMMIGRATION.

The convention of March 17, 1894, between the United States and China did not repeal any prior legislation except the act approved October 1, 1888. (25 Stat., 504.)

The Secretary of the Treasury has power to require the production of a certificate, in such form as he may prescribe, evidencing the right of certain subjects of China to enter the United States, and has authority to require that Chinese laborers leaving the United States temporarily shall return to this country only at the ports from which they depart.

DEPARTMENT OF JUSTICE,

October 16, 1894.

SIR: I have the honor to acknowledge the receipt of your letter of the 3d instant, inclosing copy of the convention of March 17 last between the United States and China for the

Chinese Immigration.

regulation of immigration between the two countries; and I have considered the questions propounded by you.

"1. Whether or not the treaty repeals in whole or in part any legislation except the act approved October 1, 1888. (25 Stat. L., 504.)"

From the examination I have been able to give to the legislation on the subject of Chinese immigration, I am of opinion that the treaty does not repeal any other legislation than that indicated.

"2. Will it be permissible for this Department to require the production of such certificate as a condition precedent to entry; and if so, may the certificate be in the form provided for by section 6 of the act approved July 5, 1884? (23 Stat., 115.)"

The power was given to you, in the act referred to, to prescribe the form of the certificate required in that act, while article 3 of the treaty is more general in its terms than were the requirements of the act referred to.

I am of opinion that it is still competent for you to require the production of a certificate, in such form as you may prescribe, by such "Chinese subjects being officials, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers, as evidence of their right to enter the United States.

"3. As to your 'authority to issue a regulation providing that Chinese laborers residing in the United States, and who may depart therefrom for temporary sojourn abroad, shall return to this country only at the ports from which they depart.'"

I am of opinion that you clearly have such authority under your general powers as well as under the legislation on this subject, which remains unaffected by the treaty.

I herewith return the copy of the convention, inclosed in your letter, as you request.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

Acceptance of Vessel—Liens—Bonds of Floyd County, Ga.

ACCEPTANCE OF VESSEL—LIENS.

The Treasury Department can legally accept the revenue cutter *Calumet*, subject to a creditor's lien, and, after satisfying the lien, proceed against the contractor's bondsmen to recover a payment in excess of the requirements of the contract.

DEPARTMENT OF JUSTICE,
October 16, 1894.

SIR: I have to acknowledge yours of this date, in which you ask my opinion upon the question whether the Treasury Department can legally accept the revenue cutter *Calumet*, subject to a creditor's lien for \$2,000, and, after discharging the lien by payment of the \$2,000, then proceed against the contractor's bondsmen to recover a balance of \$1,000 paid by the Department in excess of the requirements of the contract.

In my judgment, the Treasury Department can legally take the course above outlined. In giving this opinion, however, I assume that the contract and the bond, neither of which instruments I have seen, are in the ordinary form and contain no special provisions preventing any such action by the Treasury Department as is above indicated.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

BONDS OF FLOYD COUNTY, GA.

A proposed issue of interest-bearing bonds by the county commissioners of Floyd County, Ga., will not conflict with the banking laws of the United States.

DEPARTMENT OF JUSTICE,
October 19, 1894.

SIR: I have yours of the 17th instant, in which you request my opinion upon the question whether the proposed issue of interest-bearing bonds by the county commissioners of Floyd County, Ga., will be in conflict with the banking laws of the United States. You inclose the opinion of the Solicitor of the Treasury to the effect that such issue, if made, will not

 Bonds of Floyd County, Ga.

conflict with the banking laws of the United States, and, for the reasons given by the Solicitor, I concur in that conclusion.

As the question whether such bonds, if issued, will be subject to taxation, under sections 19 and 20 of the act of February 18, 1875, does not arise upon any facts now existing and is one upon which my opinion is not asked, I express no opinion respecting it.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

NOTE.—The portion of the opinion of the Solicitor of the Treasury referred to in the foregoing, as concurred in, is as follows:

“WASHINGTON, D. C., *September 28, 1894.*

“SIR: I have the honor to acknowledge your reference of a letter addressed to the Comptroller of the Currency by Mr. R. G. Clark, of Rome, Ga.

“Mr. Clark states that the county commissioners of Floyd County, Ga., propose to issue a certain amount in county bonds, 4 per cent interest, in denominations of \$5, \$10, and \$20, with a view of using the same as local currency; and he inquires whether such action would conflict in any way with United States banking laws.

“In response to your request for an expression of my opinion, I have to advise you that no statute of the United States prohibits the issue of county bonds in any denomination. A county has a right to issue bonds, when not in contravention to the constitution of the State.

* * * * *

“Very respectfully,

“F. A. REEVE,

“*Solicitor of the Treasury.*

“The SECRETARY OF THE TREASURY.”

Customs—Sale of Smuggled Patented Article—Indian Territory—Use of Military.

CUSTOMS—SALE OF SMUGGLED PATENTED ARTICLE.

Smuggled goods may be seized and sold by a collector of customs although protected by patents.

DEPARTMENT OF JUSTICE,

October 22, 1894.

SIR: Certain phenacetine, smuggled into the United States from Canada, has been seized by the collector of customs at Cape Vincent. It appears that the article is patented in this country. You do not inform me as to its status in Canada. I will assume, however, that a sale of the article in this country by the importer would be an infringement upon the rights of the patentee.

You ask my opinion whether this phenacetine can be lawfully sold by the collector.

Section 3077 of the Revised Statutes requires the collectors to sell goods seized for violation of the revenue laws. Section 4884, indeed, if literally applied to this case, would operate as an agreement on the part of the United States not to make such a sale. In my opinion, however, this section is not to be applied to the case of smuggled goods, but that the section first cited requires the collector to sell them whether patented or unpatented. I do not undertake to state what rights the purchaser would obtain upon such a sale. He could at least reexport the goods or resell them to the patentee.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

INDIAN TERRITORY—USE OF MILITARY.

The troops of the United States can not be employed in the Indian Territory to aid in the preservation of peace and the arrest of alleged "outlaws" and "bandits," unless such persons are trespassing or are absconding offenders within the provisions of Revised Statutes, section 2152.

DEPARTMENT OF JUSTICE,

October 27, 1894.

SIR: I have yours of the 25th instant, informing me that the Indian agent at Muscogee, in the Indian Territory, through the Commissioner of Indian Affairs, reports frequent rob-

Attorney-General—South Carolina Dispensary Law.

beries of individuals and corporations by "bandits," causing express companies to refuse to carry money and other valuables on the Missouri Pacific Railroad and producing general alarm and interruption of business in the Indian Territory. The Commissioner recommends that United States troops be sent to the agency to aid in the preservation of peace and the arrest of the "outlaws," and you inquire whether the United States troops can be used as requested by the Commissioner, and add that, as the Secretary of the Interior has requested special action, you desire an immediate reply.

Without undertaking to discuss the matter at length, therefore, I hasten to say that my conclusions agree with those of the Major-General of the Army and of the Acting Judge-Advocate-General, and that unless the persons variously described by the Commissioner as "bandits" and "outlaws" are illegally intruding or attempting to intrude upon the Indian country, or are absconding offenders within the provisions of section 2152 of the Revised Statutes, the United States troops can not be employed in the manner and for the purposes suggested.

Respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

ATTORNEY-GENERAL—SOUTH CAROLINA DISPENSARY LAW.

The Attorney-General is not authorized to give an official opinion as to "the course which should be taken" by another Department, as that involves questions of fact and considerations of expediency.

Distilled liquors in a United States bonded warehouse can not be seized under State process.

The South Carolina dispensary law of December, 1893, does not authorize any officer of that State to tender the taxes due to the United States on such liquors.

DEPARTMENT OF JUSTICE,

October 29, 1894.

SIR: I have the honor to acknowledge your letter of the 18th instant, inclosing copies of letter of Governor Tillman, of South Carolina, to the Commissioner of Internal Revenue, and of letter of the Commissioner of Internal Revenue to

Attorney-General—South Carolina Dispensary Law.

yourself, and concluding as follows: "I have, therefore, the honor to request that you furnish this Department with an opinion as to the course which should be taken by the Office of Internal Revenue in the event that the State officers of South Carolina seize spirits in the bonded warehouses in that State."

If the request thus framed is to be literally construed, it is out of my power to comply with it. The course to be pursued by your Department, in the event specified, may involve matters of fact of which I have no knowledge and considerations of expediency upon which it is not for me to pass judgment. I assume, however, that what is meant to be inquired about is a question of law arising or sure to arise in the administration of your Department, and which may be thus stated: If the officers of the State of South Carolina undertake to enter a United States bonded warehouse in South Carolina and to seize distilled liquors therein under the dispensary law of December, 1893, simultaneously tendering to the collector of internal revenue any tax lawfully due on such liquors, is such action to be acquiesced in as not in conflict with any laws or rights of the United States?

1. The legal status of distilled liquors in a bonded warehouse of the United States, and under the control of the collector of internal revenue, is definitely stated and settled by section 934 of the Revised Statutes of the United States, which declares that "All property taken or detained by any officer or other person under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

2. It need not be held, as has been suggested, and perhaps might well be, that since the tariff act of August 27, 1894, the taxes due on distilled liquors in a United States bonded warehouse can be paid only by the distiller. Whether that be so or not, a tender of such taxes by a sheriff or other like State officer is necessarily ineffectual as against the statute above quoted, since it is beyond the power of an internal revenue collector to accept it and thus nullify the provisions and defeat the policy of a statute which aims to absolutely

Assignment of Claims Against United States.

exempt such liquors from the operation of the process of a State court. Such tender, which, for the reason stated, the collector is incompetent to accept, must be also ineffectual, because no officer of South Carolina has been given the right or power to make it; the legislation of South Carolina not authorizing any such tender, nor providing any fund which can be used for that purpose.

The result is that the provisions of the South Carolina dispensary law of 1893 must be regarded as ineffective and inoperative as against distilled liquors held in a United States bonded warehouse under the control of the collector of internal revenue.

I send herewith for your information a copy of a courteous letter from Governor Tillman, written me in answer to my inquiry—made through the Commissioner of Internal Revenue—respecting the authority of any officer of South Carolina to make payment or tender of the United States taxes due on such distilled liquors.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

ASSIGNMENT OF CLAIMS AGAINST UNITED STATES.

An assignment of an indebtedness admittedly due by the United States is not inhibited by Revised Statutes, section 3477. (17 Opin., 545, approved.)

A disbursing officer who holds a Treasury draft payable to the order of the original contractors should not deliver it to a receiver appointed in an action between contesting claimants.

DEPARTMENT OF JUSTICE,

November 2, 1894.

SIR: I beg to acknowledge the receipt of a communication of October 29, from Hon. Joseph B. Doe, Acting Secretary of War, transmitting certain papers relating to the claim of J. J. Leonard and others against Whaley & Taylor, late Government contractors.

From this letter and accompanying papers it appears that the United States is indebted to Whaley & Taylor in the

Assignment of Claims Against United States.

sum of \$17,350, that being the balance due upon the contract for work performed by them as Government contractors. That a Treasury draft for \$17,350, payable to the order of Whaley & Taylor, dated August 30, 1894, has been and is now in the hands of Lient. Edgar Jadwin, post quartermaster at Willets Point, N. Y. That it is alleged that by an agreement entered into between the firm of Whaley & Taylor of one part and Hammond and Leonard and Schofield, of the other part, all of the money coming to Whaley & Taylor from the United States under their contract was assigned by them to Hammond, Leonard, and Schofield. And it further provided therein that all drafts and checks, payable to Whaley & Taylor on said contract should be by them assigned by proper indorsement.

That in a suit now pending in the supreme court of Kings County, N. Y., of John J. Leonard and George Schofield against Whaley, Taylor, and Hammond, an injunction was awarded restraining the said Whaley & Taylor from collecting or receiving, in whole or in part, the proceeds of the Treasury draft above mentioned.

And on the 19th of March, 1894, by an order made in said cause, the People's Trust Company was appointed receiver "of any check, draft, order, or warrant which the defendants, Whaley & Taylor, or either of them, may receive from the United States, etc. * * * And the said defendants, Whaley & Taylor, are hereby directed to surrender and deliver any such check, draft, order, or warrant upon receipt thereof to said receiver."

Upon the foregoing state of facts the Acting Secretary of War asks my opinion as to whether he "would be authorized to direct the said disbursing officer to pay over or deliver to the said receiver the said Treasury draft."

I am of the opinion that the disbursing officer, who, as an officer of the U. S. Government, holds the draft payable to the order of Whaley & Taylor, can not, with propriety or safety, be directed to turn that draft over to the receiver of the State court in the proceeding referred to.

The United States is not a party to that proceeding, and without its consent can not be made a party.

Assignment of Claims Against United States.

Lieutenant Jadwin, the quartermaster and present custodian of the Treasury draft, is not a party and can not in his official character be proceeded against in that cause.

The State court appears to have obtained jurisdiction over all the contending parties, and has restrained the payees of the draft from receiving or collecting the proceeds of it.

On the 8th of October, 1894, Whaley & Taylor filed their petition against the United States in the Court of Claims for the recovery of the amount of this Treasury draft.

It appears that there is no dispute as between the United States and the contractors, Whaley & Taylor, as to the amount due to them on their contract; that the United States has no other interest in this matter than to pay over this ascertained amount to whoever may be legally and properly entitled thereto. And if it be true that Whaley & Taylor have actually assigned this debt to Leonard and others, then, upon that state of facts, I concur in the views expressed in the opinion of a former Solicitor-General, which are approved and adopted by the Hon. Benjamin Harris Brewster, my predecessor in office, that such an assignment is not in violation of section 3477, Revised Statutes. (17 Opin., 545.)

I do not feel at liberty to express any further opinion upon the merits of this controversy, or as to the course which should be pursued by the parties, having fully responded to the only inquiry submitted to me, as to the propriety of the delivery by Quartermaster Jadwin of the Treasury draft to the receiver of the court.

I herewith return all of the inclosures which accompanied the letter of the Acting Secretary.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

Liens—Property of United States—War Department—Modification of Contract.

LIENS—PROPERTY OF UNITED STATES.

Mechanic's liens can not be acquired upon property of the United States.
(Opin. of May 11, 1894, followed.)

DEPARTMENT OF JUSTICE,
November 7, 1894.

SIR: I have your two favors of the 2d instant, relating to the claim of Mr. James Bigler against Messrs. Byron Barlow & Co., contractors for the construction of a dry dock on Puget Sound, and requesting my opinion upon the questions whether, in view of the contract provisions quoted and referred to, your Department has become obligated to protect Mr. Bigler in the premises or has the legal power to enforce payment of his claim against Byron Barlow & Co., arising by reason of his construction and furnishing of a caisson for said dry dock.

In my judgment, both questions must be answered in the negative, the opinion of this Department of May 11, 1894, cited in your letter, being directly applicable so far as any mechanic's liens are concerned. It is plain that any representations of Commodore Farquhar, however much Mr. Bigler may have relied upon them, must be regarded as wholly personal, binding himself, but of no effect as against the United States.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

WAR DEPARTMENT—MODIFICATION OF CONTRACT.

The contract with Edwards, Howlett & Thompson for the improvement of the Hudson River may be legally modified, so as to provide for the acquirement by the United States, through condemnation, of the lands necessary for dumping grounds, to be maintained at the cost of the contractors.

DEPARTMENT OF JUSTICE,
November 10, 1894.

SIR: I have the honor to acknowledge yours of the 7th instant, inclosing copy of contract with Edwards, Howlett & Thompson, of New York City, for the improvement of the Hudson River; calling attention to the clause by which the contractors undertake to provide their own dumping grounds

War Department—Modification of Contract.

at their own expense and to a proposed modification of the contract by a supplemental contract of the tenor following: "The Secretary of War will, whenever he deems necessary and proper and for the best interests of the United States, authorize proceedings to be taken in the name of the United States with the same force and effect as if such work was being performed directly by the Government for the acquirement by condemnation of lands, right of way, and material to enable the work to be maintained, operated, or prosecuted, but all expenses incurred in and about the maintenance of such dumping grounds will be defrayed by the contractors without reimbursement by the Government"; and requesting my opinion upon the point whether the proposed modification is such an one as can legally be made under the original advertisement.

The advertisement under which the original contract was made can no longer be regarded as of any material importance, since the work contracted for has been partially executed, while unforeseen obstacles have arisen which threaten to greatly hinder and probably prevent its complete execution. Under such circumstances, what the contractors propose is a modification of the contract, which, while it relieves them of their difficulty, is in reality more favorable to the Government than the original contract. Under its terms the contractors were to furnish the necessary dumping grounds. But under the terms as modified, not only will the contractors practically furnish the dumping grounds by paying the United States all they cost, but when the contract has been fulfilled the United States will own the dumping grounds, and will be pecuniarily benefited to the extent of their value. Without approving the precise terms of the proposed supplemental contract—which I think may be advantageously changed in some particulars—the advertisement, pursuant to which the contractors bid for and were awarded the original contract, does not, in my judgment, offer any legal difficulty to the making of substantially such a supplemental contract as is suggested.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF WAR.

Duty—Imported Salt—Treaty with Prussia.

DUTY—IMPORTED SALT—TREATY WITH PRUSSIA.

The treaty of May 1, 1828, between the United States and the Kingdom of Prussia, is to be taken as operative as respects so much of the German Empire as constitutes the Kingdom of Prussia. *Seemle*, that it is not effective as regards the rest of that Empire.

The "most-favored-nation clause" in that treaty is not violated by paragraph 608 of the tariff act of August 27, 1894, laying a discriminating duty on salt imported from a country which imposes a duty on salt exported from the United States.

In case of conflict between a treaty and a subsequent statute, the latter governs.

The laws of a foreign country are not known to the Attorney-General, but are facts to be proved by competent evidence.

As to when the discriminating duty aforesaid applies to a country which imposes a duty on salt exported from the United States but lays a countervailing excise tax on domestic salt. *Quære*.

DEPARTMENT OF JUSTICE,

November 13, 1894.

SIR: I have the honor to acknowledge your communication of October 27, asking my official opinion upon the question whether salt imported from the Empire of Germany is dutiable under paragraph 608 of the tariff act of August 27, 1894. That paragraph, which puts salt in general on the free list, contains the following proviso:

"Provided, That if salt is imported from any country whether independent or a dependency which imposes a duty upon salt exported from the United States, then there shall be levied, paid, and collected upon such salt the rate of duty existing prior to the passage of this act."

As Germany imposes a duty upon salt exported from the United States, German salt is apparently subject to the proviso just quoted. The German ambassador, however, claims it is entitled to come into the United States free on two grounds.

One is the "most-favored-nation clause," so called, which is embodied in the following provisions of the treaty of May 1, 1828, between the United States and Prussia:

"ARTICLE V.

"No higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of Prussia, and no higher or other duties shall

Duty—Imported Salt—Treaty with Prussia.

be imposed on the importation into the Kingdom of Prussia of any article the produce or manufacture of the United States than are or shall be payable on the like article being the produce or manufacture of any other foreign country. * * *

“ARTICLE IX.

“If either party shall hereafter grant to any other nation any particular favor in navigation or commerce it shall immediately become common to the other party freely, where it is freely granted to such other nation, or on yielding the same compensation, when the grant is conditional.”

It should be noted that while this treaty is to be taken as operative as respects so much of the German Empire as constitutes the Kingdom of Prussia no facts or considerations with which I have been made acquainted justify the assumption that it is to be taken as effective as regards other portions of the Empire. Neither am I informed whether the German salt, for which free admission into this country is demanded, is a product or manufacture of Prussia proper, or of some other part or parts of the German Empire.

If it be assumed, however, for present purposes, that the treaty of 1828 binds the United States as regards all the constituent parts of the German Empire, the claim of the German ambassador, founded upon the “most-favored-nation clause,” must be pronounced untenable for at least two conclusive reasons.

In the first place, the “most-favored-nation clauses” of our treaties with foreign powers have from the foundation of our Government been invariably construed both as not forbidding any internal regulations necessary for the protection of our home industries, and as permitting commercial concessions to a country which are not gratuitous, but are in return for equivalent concessions, and to which no other country is entitled except upon rendering the same equivalents. Thus, Mr. Jefferson, when Secretary of State in 1792, said of treaties exchanging the rights of the most-favored nation that “they leave each party free to make what internal regulations they please, and to give what preference they find expedient to native merchants, vessels, and productions.” In 1817 Mr. John Quincy Adams, acting in the same official

Duty—Imported Salt—Treaty with Prussia.

capacity, took the ground that the "most-favored-nation clause only covered gratuitous favors and did not touch concessions for equivalents expressed or implied." Mr. Clay, Mr. Livingston, Mr. Evarts, and Mr. Bayard, when at the head of the Department of State, have each given official expression to the same view. It has also received the sanction of the Supreme Court in more than one well-considered decision, while in *Bartram v. Robertson* (122 U. S., 116), Mr. Justice Field, speaking for the whole court, expounded the stipulations of the "most-favored-nation clause" in this language (p. 120):

"They were pledges of the two contracting parties, the United States and the King of Denmark, to each other, that, in the imposition of duties on goods imported into one of the countries which were the produce or manufacture of the other, there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation upon both countries to avoid hostile legislation in that respect."

This interpretation of the "most-favored-nation clause," so clearly established as a doctrine of American law, is believed to accord with the interpretation put upon the clause by foreign powers—certainly by Germany and Great Britain. Thus, as the clause permits any internal regulations that a country may find necessary to give a preference to "native merchants, vessels, and productions," the representatives of both Great Britain and Germany expressly declared, at the International Sugar Conference of 1888, that the export sugar bounty of one country might be counteracted by the import sugar duty of another without causing any discrimination which could be deemed a violation of the "most-favored-nation clause." So both Germany and Great Britain acquiesced in the position of the United States, that our treaty with Hawaii did not entitle those nations to equal privileges in regard to imports with those thus obtained by the United States, the privileges granted to the United States being in consideration of concessions by the United States which Germany and Great Britain not only did not offer to make, but, in the nature of things, could not make.

If these established principles be applied to the case in hand but one result seems to be possible. The form which

Duty—Imported Salt—Treaty with Prussia.

the provisions of our recent tariff act relating to salt may have assumed is quite immaterial. It enacts, in substance and effect, that any country admitting American salt free shall have its own salt admitted free here, while any country putting a duty upon American salt shall have its salt dutiable here under the preexisting statute. In other words, the United States concedes "free salt" to any nation which concedes "free salt" to the United States. Germany, of course, is entitled to that concession upon returning the same equivalent. But otherwise she is not so entitled, and there is nothing in the "most-favored-nation clause" which compels the United States to discriminate against other nations and in favor of Germany by granting gratuitously to the latter privileges which it grants to the former only upon the payment of a stipulated price.

In the next place, even if the provisions of our recent tariff act under consideration could be deemed to contravene the "most-favored-nation clause" of the treaty with Germany—as they can not be for the reasons stated—the result will be the same. The tariff act is a statute later than the treaty and, so far as inconsistent with it, is controlling. The principle is too well settled to admit of discussion, and if any relief from its operations is desirable it can be obtained only through proper modifying legislation by Congress.

While the first proposition of the German ambassador proceeds upon the basis that Germany does levy an import duty on American salt, his second proposition is that in reality it does not do so. The duty, it is said, should be regarded as in fact an internal excise tax, since a tax equivalent to the duty is levied upon all salt in the country whenever and however it appears, and is the same upon salt produced in Germany as upon salt coming from the United States. It is matter of convenience merely that the tax upon American salt is collected immediately upon its arrival in port. In short, the claim is that there is no discrimination against American salt, which is the evil our statute aims to prevent; that American salt and German salt are in reality treated on a footing of entire equality.

The validity of this proposition I do not think I am in a position to judge of, for want of sufficient data. The laws of

Navy—Speed Premiums.

Germany I do not and can not be expected to know, and, like other foreign laws, are facts to be proved by competent evidence. The statement respecting them made by the German ambassador in a communication to the Secretary of State (copy of which you inclose) are undoubtedly correct, but they leave me in doubt upon what seems to me a vital point, viz, whether the internal excise tax on salt referred to is imperial in character—that is, is levied by and belongs to the Imperial Government—or is local, and is levied by and belongs to one or more constituent states of the Empire. If it is of the latter character, it probably can not be considered in relation to the matter in hand any more than a like domestic tax of any one or more of the States of the United States could be considered in the same relation. If, however, it could be considered under any circumstances, then it is obviously material to know whether such tax is levied by all of the constituent states of the Empire, without exception, and actually or necessarily at the same rate.

As at present advised, therefore, salt imported from the Empire of Germany is, in my judgment, legally dutiable under the statute above quoted.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

NAVY—SPEED PREMIUMS.

The appropriation for special speed premiums, made by the act of July 26, 1894, chapter 165, is not limited in its application to premiums earned prior to January 1, 1894.

DEPARTMENT OF JUSTICE,

November 16, 1894.

SIR: I have the honor to acknowledge yours of the 9th instant, replying to mine of the 6th instant, in which I made certain inquiries bearing upon the question respecting the payment of premiums earned by certain naval vessels, as to which my opinion was requested by your previous favor of the 2d instant.

If the act of 1894 had not contained the special-premium clause all premiums lawfully earned and becoming due under

General Appraisers—Charges—Investigation.

contract during the fiscal year ending June 30, 1895, would have been payable from the appropriation therein made. That clause must have been added either to enlarge the scope of the act or to narrow it; either to make it cover premiums that might otherwise be held not to be covered, or to limit its operation to the particular class of premiums specifically mentioned. The choice is between one or the other of these constructions, and the exact purpose of Congress may not be entirely clear. But no reason can be assigned, that I am aware of, why Congress should desire to exclude from the operation of the act of 1894 premiums earned after January 1, 1894, and during the fiscal year 1894-95. On the other hand, Congress may well have considered that an appropriation for the naval service for the fiscal year 1894-95 might not necessarily be held to embrace premiums earned during the year 1893 or earlier, and may well have added the special-premium clause to preclude any doubt on that point. The best result I can reach, therefore, is that the latter is the true construction, and that the appropriation for speed premiums made by the act of 1894 is not limited in its application to premiums earned prior to January 1, 1894.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

GENERAL APPRAISERS—CHARGES—INVESTIGATION.

The general appraisers appointed under the customs administration act of June 10, 1890, are officers of the Treasury Department.

If inefficiency, neglect of duty, or malfeasance in office is charged against one of them, it is the duty of the Secretary of the Treasury to investigate the matter.

DEPARTMENT OF JUSTICE,

November 17, 1894.

SIR: I am in receipt of your communication asking my official opinion as to whether you have the power to investigate the action of one of the General Appraisers in valuing an invoice of goods.

It appears that certain merchandise recently imported at the port of New York was advanced in value by the local

General Appraisers—Charges—Investigation.

appraiser; that on reappraisement by one of the General Appraisers, under section 13 of the customs administrative act of June 10, 1890, chapter 407, the action of the local appraiser was not sustained; and that you have reason to believe that investigation should be made as to the propriety of the General Appraiser's conduct. You state that you do not claim the right to review the decision on this case, but that you wish simply to ascertain the facts on which the General Appraiser based his conclusion; but that the latter has refused all information on the subject, and stated that he does not recognize your right to make the investigation.

It is true that by the terms of the customs administrative act decisions of the General Appraisers upon valuation are final, and their decisions as to classification and charges are final, unless appealed from, in which case they can be reviewed only by the court, and that, on occasion, the General Appraiser acts as an officer of the court. (Secs. 13, 14, 15.)

On the other hand, they are placed, to a great extent, under your direction and control. (Secs. 12, 18.) It was held by Attorney-General Miller, in his opinion of July 6, 1891, that the General Appraisers are officers of your Department, and in that opinion I concur.

They are appointed by the President, by and with the advice and consent of the Senate, and may be removed from office by the President only. (Sec. 12.) They may be removed by him, however, at any time for inefficiency, neglect of duty, or malfeasance in office. As they are officers of your Department, I think it is your duty, if inefficiency, neglect of duty, or malfeasance in office is charged, to investigate the matter, so that if the facts seem to require you may report the matter to the President for his action. There are many officers in the Government Departments who have *quasi* judicial functions independent of the head of the Department. I do not think that this makes them so independent that they can not be investigated by their chief if malfeasance is suspected. Your question, therefore, is answered in the affirmative.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

District of Columbia—Strong Award.

DISTRICT OF COLUMBIA—STRONG AWARD.

Questions arising in settlement of an award made under a joint resolution of Congress approved July 10, 1888 (25 Stat., 1248), to arbitrate and settle certain questions at issue between the District of Columbia and Samuel Strong, considered and answered.

DEPARTMENT OF JUSTICE,

November 20, 1894.

SIR: I have the honor to acknowledge yours of the 8th instant, in which you submit for my consideration and opinion certain questions arising in the settlement of an award made under a joint resolution of Congress approved July 10, 1888 (25 Stat., 1248), to arbitrate and settle certain questions at issue between the District of Columbia and Samuel Strong.

The questions stated are:

1. What amount of money is required to be paid under the decree of the supreme court of the District of Columbia, and to whom is the money to be paid?
2. What rate of interest is to be allowed on the award from the date fixed by the arbitrators, November 10, 1874, to date of rendition, January 11, 1889?
3. At what rate and for what period is interest to be allowed on the award?
4. Whether the amount paid to the arbitrators and \$1,000 taxed as costs for printing are to be paid from the amount awarded and charged *pro rata* to the beneficiaries of the award.

I construe your first question to inquire what amount of money is to be paid, not under the decree of the supreme court of the District of Columbia, but under the award, the United States having assented to be bound by the latter, but not by the former, except so far as it may be consistent with the award.

In that view, questions 1 and 2 may be answered together, and my opinion is as follows:

1 and 2. The amount of money to be paid under the award is \$28,257.38, together with interest thereon at the rate of 6 per cent per annum from November 10, 1874, to January 11, 1889.

Articles of War—City Ordinance—Arrest.

This amount, less \$500, to be paid the receivers, William F. Mattingly and A. B. Duvall, is to be paid as follows:

To William A. Cook, \$8,869;

To Frank T. Browning, \$8,869;

To George E. Kirk, \$12,500, and

To Paul Butler, administrator, \$22,323.15, or so much of said sum as may remain after paying the sums above named to Messrs. Cook, Browning, and Kirk.

3. No interest is payable on said award of January 11, 1889, the money for the payment of the award being appropriated by the statute authorizing the arbitration as of and from the time of the making of the award.

4. The amount paid the arbitrators and the \$1,000 taxed as cost of printing are not chargeable to the beneficiaries of the award.

I return herewith the papers inclosed with your favor, and remain,

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

ARTICLES OF WAR—CITY ORDINANCE—ARREST.

A city ordinance is within the expression "laws of the land," as used in the fifty-ninth article of war, and a soldier violating such an ordinance and escaping to a military reservation should be delivered to the civil authorities for trial on demand.

DEPARTMENT OF JUSTICE,

November 26, 1894.

SIR: I have the honor to acknowledge yours of the 21st instant, quoting the fifty-ninth article of war, and asking my opinion upon the following points:

1. Does the expression "laws of the land," as used in the fifty-ninth article of war, include city ordinances and by-laws?

2. May a soldier be arrested, tried, and punished by a civil authority for the violation of a city ordinance?

3. If he escapes to a military reservation can a demand be made by the civil on the military authorities for his surrender; and if so, will it be the duty of the commanding officer to surrender him?

Articles of War—City Ordinance—Arrest.

If the first question is answered affirmatively, I see no escape from the conclusions that a soldier may be arrested, tried, and punished by the proper civil authorities for the violation of a city ordinance, and that if he escape to a military reservation his surrender may be demanded by the proper civil authorities, and should be made by the military officer in command.

The real inquiry, then, being whether a municipal ordinance is comprehended by the phrase "laws of the land," as used in the fifty-ninth article of war, I have no hesitation in saying that, in my judgment, it is so comprehended.

The general reasoning on the subject by the learned Acting Judge-Advocate-General, as contained in his elaborate memorandum of January 25, 1875, can not, I think, be successfully controverted, and need not be here repeated. But it may not be amiss to make special reference to a class of adjudications which clearly define the nature of municipal ordinances and apparently render the result reached by Mr. Lieber inevitable. They are illustrated by a recent case in Vermont in which the facts were that a village charter granted to the village certain powers in the matter of licensing eating houses which were repugnant to a general statute already in force. The village made a by-law or ordinance, pursuant to its charter, and the question arose which prevailed—the ordinance or the general law? Did the general law nullify the ordinance, or did the ordinance nullify the general law *pro tanto* and as regards that particular village? The decision was that the ordinance, conforming as it did to the charter, repealed for that village the preexisting general law. It was held to do so because, though in form an ordinance, yet being authorized by the village charter, it was in reality a special statute of the State of Vermont. The same principle is affirmed in numerous well-considered adjudications of the highest authority. But if valid municipal ordinances are in substance and effect special statutes of the State chartering the cities or towns making the ordinances, they are certainly to be regarded as among the "laws of the land," unless that phrase is to be construed as covering the general legislation of the State only and is exclusive of its special legislation. But no distinction of that sort, it is

Treasury—Fraud of Partner—Penalty.

believed, has ever been attempted or has any foundation in reason or precedent. The result is, as already stated, that the by-laws or ordinances of a town or city are to be taken as part of the "laws of the land" within the meaning of that phrase as used in the fifty-ninth article of war.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

TREASURY—FRAUD OF PARTNER—PENALTY.

Fraud committed by a partner in a transaction which he is conducting on behalf of the firm is regarded by the law as fraud committed by the firm, although it be unsuccessful, and although it was the intention of the partner to cheat his own firm as well as the other party. The Secretary of the Treasury can not remit a penalty imposed on the firm under such circumstances.

DEPARTMENT OF JUSTICE,

November 27, 1894.

SIR: I have the honor to acknowledge your communication of November 16, asking my official opinion upon a point relating to the application of Messrs. Pitt & Scott for a remission of penalties under section 5293 of the Revised Statutes.

That section authorizes the Secretary of the Treasury to remit any penalty imposed under authority of the revenue laws not exceeding \$1,000, "if, in his opinion, it was incurred without willful negligence or fraud." The sums asked to be remitted in the present case were imposed as penalties or so-called "additional duties" for undervaluation of imported goods, under section 7 of the customs administrative act of June 10, 1890, chapter 407.

These goods were assigned to Messrs. Pitt & Scott, who are forwarders of foreign freight, and thus came into the hands of the managing partner at New York. You are of the opinion that the undervaluation attempted by him was a deliberate fraud against the United States. As a general rule, when a successful fraud has been committed by one member of a partnership in a transaction which he is conduct-

 Civil Service.

ing on behalf of the firm, it is not regarded by the law as his individual fraud simply, but the firm, as a firm, is regarded as guilty. (*Strang v. Bradner*, 114 U. S., 555.) I think the rule must hold good when the fraud is unsuccessful as well as when it is successful. You are of the opinion, however, that the managing partner intended to cheat his own firm as well as the United States; that is, that he intended to appropriate to his own use the amount thereby realized, and in fact made no entry of the goods on the firm's books. If, therefore, the fraud had been successful, the firm would have reaped no benefit. I do not think, however, that this would materially affect the case.

Since, therefore, you are of opinion that one member of the firm in entering goods consigned to the firm committed a fraudulent undervaluation, I advise you that you are not authorized to remit the consequent penalty.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

 CIVIL SERVICE.

The phrase "no person appointed to a place," as used in the civil-service rule substituted by the President November 2, 1894, for section 4 of departmental Rule II, affects those holding places as well as those thereafter appointed.

DEPARTMENT OF JUSTICE,

November 27, 1894.

SIR: I have the honor to acknowledge yours of the 17th instant, in which you quote the departmental civil-service rule substituted by the President November 2, 1894, for section 4 of Departmental Rule II (Tenth Report, U. S. Civil Service Commission, p. 45), viz:

"No person appointed to a place under the exceptions to examinations made by any departmental rule shall be transferred from such place to a place not also excepted from examination."

You inquire whether this section is to be construed so as to affect persons appointed prior to November 2, 1894.

Customs—Warehoused Coal—Refunds.

In my judgment, the phrase "no person appointed to a place," as used in the rule above quoted, describes every person either holding a place at the time the substituted rule took effect, viz, November 2, 1894, or thereafter holding it by subsequent appointment.

Yours, respectfully,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

CUSTOMS—WAREHOUSED COAL—REFUNDS.

"Sea stores" in our tariff legislation are the stores contained in incoming vessels which are necessary for their use for the purposes of the voyage; articles which, brought into port aboard ship, are to be consumed aboard or carried off again in the outward voyage, or, if put ashore at all, landed only for the convenience of the ship.

"Merchandise" is a word used in different senses in different parts of said legislation. In Revised Statutes, sections 2766, 3111, it covers any tangible personal property; in sections 2795, 3113, it means property imported into the country, whether for sale or not. In the act of March 3, 1875 (chap. 136, sec. 1), it has a narrower meaning, but still includes all personal property not imported for the use or enjoyment of the importer himself.

Said act of 1875 has no application to a case where the duties were correctly assessed, but the claim is that something happening subsequently has relieved them from payment of the exaction.

The written protest or notice provided for by the customs administrative act of June 10, 1890, is required only for the purpose of instituting a proceeding before the Board of General Appraisers, to review the decision of a collector or appraiser. The collector's decisions so reviewed are decisions made in pursuance of a duty imposed upon the collector personally by the statute, not to decisions made by him under authority delegated to him by the Secretary of the Treasury.

The decision of an application to withdraw warehoused goods or supplies for vessels under the statute of June 26, 1884 (chap. 121, sec. 16), is confided by the law in the Secretary of the Treasury.

DEPARTMENT OF JUSTICE,

December 1, 1894.

SIR: I have the honor to acknowledge your communication of November 23, asking my official opinion upon questions raised by the application of Kennedy & Moon for a refund of duties upon certain warehoused coal withdrawn by him.

Customs—Warehoused Coal—Refunds.

It appears that the coal in question was imported under the tariff act of 1890; that the duties thereon were duly liquidated, but that the coal was warehoused, so that the duties were not at the time paid. Subsequently, in May, 1894, an application was made to withdraw this coal free of duty under the provisions of the merchant shipping act of June 26, 1884 (chap. 121, sec. 16). This application was refused by the collector, who held coal not to be one of the articles covered by that section. The applicants then paid the liquidated duties in order to get possession of the coal, but, as you inform me, "without formal protest." You have ruled that the applicants ought to have been permitted to withdraw the coal free of duty, and the practice has been changed to conform with this ruling, as to whose correctness you do not ask my advice.

You ask me first, however, whether you can refund the duties thus erroneously collected under the provisions of the act of March 3, 1875 (chap. 136, sec. 1). That section provides that duties may be reliquidated and refunded by the Secretary of the Treasury when they "have been *assessed and* collected under an erroneous view of the facts in the case." The act then proceeds as follows:

"But no such reliquidation shall be allowed unless protest and appeal shall have been made, as required by law: *Provided further*, That the restrictive provisions of this act shall not apply to such personal and household effects, and other articles not merchandise, as are by law exempt from duty."

The protest and appeal referred to in that section were plainly the protest and appeal described in section 2931 of the Revised Statutes; and since the latter provision was superseded by the customs administrative act of June 10, 1890, chapter 407, the reference must be construed as made to the corresponding provisions of the latter act. You have therefore no authority to reliquidate and refund under the act of 1875, unless the coal can be brought within the meaning of the proviso above quoted.

It is claimed by the applicant that the coal is within this proviso, because it is "not merchandise," and they base this claim mainly on an argument that it can not be merchandise,

Customs—Warehoused Coal—Refunds.

because, having been withdrawn for use in fueling ocean steamers, it comes within the class of "sea stores." This claim, however, is based upon a misunderstanding. "Sea stores," in our tariff legislation, are the stores contained in incoming vessels which are necessary for their use for the purposes of the voyage. These stores are plainly enough merchandise when purchased, and they are so treated by the statutes (Rev. Stat., sec. 3111) until put aboard ship. They then become, practically speaking, part of the equipment of the ship, which equipment, like the ship itself, is exempt from duty, because, though personal property, it is not regarded as an import. (*The Conqueror*, 49 Fed. Rep., 99, 103, 105.) This seems to have been assumed from the very beginning of our Government, it being taken for granted that sea stores were exempt from duty even before they were expressly made exempt. The name was always restricted to articles which, brought into port aboard ship, were to be consumed aboard or carried off again on the outward voyage; or, if put ashore at all, landed only for the convenience of the ship itself. (See act of Aug. 4, 1790, chap. 35, sec. 22; act of Mar. 2, 1799, chap. 22, sec. 45; Rev. Stat., secs. 2795, 2796, 2797.) Articles do not become "sea stores" until they have thus become part of the ship's equipment.

The word "merchandise" is used in different senses in different parts of our customs legislation. In Revised Statutes, sections 2766 and 3111, it covers any tangible personal property. In sections 2795 and 3113 it means property imported into the country, whether for sale or not. In the act of 1875 it has a narrower meaning, but still includes all personal property not imported for the use or enjoyment of the importer himself.

Moreover, the restrictions in the act of 1875 do not apply to merchandise alone. I think they apply as well to all dutiable goods imported. The words "exempt from duty" refer to the status of the article at the time of its importation. In fact the act of 1875, as is plainly shown by the portions above quoted, was intended only to apply to cases where the duties were improperly assessed and therefore improperly collected. It has no application to a case where the duties were correctly assessed, but the claim is that

Customs—Warehoused Coal—Refunds.

something happening subsequently has relieved them from payment of the exaction.

Your first question, therefore, is to be answered in the negative.

You further ask whether, apart from the statute of 1875, you are authorized to refund the duties without protest. I assume the meaning of this question to be whether you are authorized to make the refund in the absence of a written protest or notice such as required by the customs administrative act. In your statement of the facts you inform me that there was no "formal protest," from which I infer that there was an informal verbal protest or notice of objection at the time, probably such as in the absence of any statutory provision to the contrary would have been sufficient to support a suit against the collector. (*Swartwout v. Gihon*, 3 How., 110.)

The protest or notice required by the customs administrative act is a step preparatory to a submission of the question at issue to the Board of General Appraisers. If such a protest was required, then it follows that the question of the right to withdraw this coal free of duty is not a question for yourself to decide, but one which must be left with the General Appraisers, subject to review by the courts. Is this, then, one of the cases which the customs administrative act includes within the jurisdiction of the administrative board thereby established? The cases confided to the General Appraisers are two: First, the decisions of the appraiser of the port, or person acting as such, as to the value of merchandise imported; second, the decisions "*of the collector* as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges." (Secs. 13, 14.) The collector's refusal to allow a withdrawal of the coal was a decision as to the rate and amount of duties chargeable thereon. Was it, however, a "decision of the collector" within the meaning of the statute? I think not. The decisions thus referred to, in my opinion, are decisions made by the collector in pursuance of a duty imposed upon him personally by the statute. In other words, they are the decisions made by him under the provision that "the collector, or the person acting as such, shall ascertain, fix, and

Attorney-General—Contract Articles—Infringement of Patents.

liquidate the rate and amount of duties to be paid on such merchandise, and the dutiable costs and charges thereon, according to law." (Sec. 13.) He is, however, given no authority by statute to pass upon such questions as those here presented. When he does so, it is not in pursuance of any independent authority, but solely because you depute him to act as your agent for that purpose. The decision of the question presented by this application is confided by the law in yourself personally.

"All articles of foreign production needed and actually withdrawn from bonded warehouses for supplies, not including equipment of vessels, * * * may be so withdrawn free of duty under such regulations as the Secretary of the Treasury may prescribe." (Stat. of June 26, 1884, sec. 16.)

You might prescribe that such applications be made directly to you at Washington, or you might depute the duty of passing upon such applications to some officer other than the collector. I do not think, therefore, that the customs administrative act has any application to the present case. This is apparently the opinion of the General Appraisers themselves, who have disclaimed jurisdiction over the analogous question of drawbacks. (Syn. Dec., No. 14522.)

Without considering the question, which does not now arise in the administration of your Department, whether you can properly refund duties paid on withdrawal entries by mutual mistake of law, I advise you that under the circumstances of the present case you have authority to make the refund desired.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL—CONTRACT ARTICLES—INFRINGEMENT OF PATENTS.

An opinion upon questions of fact refused.

Injunction will not lie against a Department of the Government to restrain the use of an article alleged to be an infringement of a patented invention, and the Government can not be held liable in damages for such use.

Attorney-General—Contract Articles—Infringement of Patents..

Where loss may result to the Government or its officers from the use by contractors of patented inventions, or other property of third persons, a board of indemnity should be required.

DEPARTMENT OF JUSTICE,

December 18, 1894.

SIR: I beg to acknowledge receipt of your communication of the 8th instant, inclosing copy of a contract of 26th of October, 1894, between the Chicago Car Seal and Manufacturing Company of Chicago, Ill., of the one part, and the United States of America, by Charles W. Dabney, Acting Secretary of Agriculture, of the other part, for furnishing certain supplies of lead car seals for the Government, with a letter from E. J. Brooks & Co. to the Secretary of Agriculture of November 28, 1894, and a letter from A. H. Pierce to the Chief of the Bureau of Animal Industry of November 17, 1894.

Your several inquiries will be considered in the order in which they are propounded.

"1. Does the seal contracted for and furnished this Department, manufactured under patent No. 464174, infringe upon patents No. 323649, 481892, or 298665?"

This inquiry calls for my opinion as to matters of fact, and as to such matters it has been the uniform practice of this Department, for reasons that must be obvious, to decline to give opinions.

Whether or not one patent infringes upon others is a matter of fact upon which the opinion of officers connected with the Patent Office would be more valuable as a practical guide than any which I would feel authorized to express.

"2. If contractor is manufacturing under a patent, would he be subject to injunction prior to a determination by the courts of the question of an infringement, and will an injunction lie against this Department, or its officials as individuals, as parties to such suit?"

Upon a proper case, aptly stated in a bill, a judge may grant the preliminary injunction to restrain the manufacture or use of a patented invention prior to a final determination of the case. Such restraining order may be directed against one who, as a contractor, is manufacturing articles under the

Attorney-General—Contract Articles—Infringement of Patents.

alleged infringing patent, or it may be directed against any individuals charged with using such articles, who may be parties to such bill. It will not lie against one of the Departments of the Government.

“3. Will any claim for damages lie against the Government for using all the seals that might be obtained by the Department under the contract prior to any judicial decree, supposing such decree be adverse to claims of contractors?”

No action for damages for the infringement of a patent will lie against the Government. No contract to pay for the use of a patented invention will be implied as between the Government and the owner of such patented device, unless such use has been exercised and enjoyed by the Government under circumstances from which it would be fairly and reasonably inferred that the two parties had actually intended a contract, as, for example, where the Government uses a patented invention, fully recognizing and admitting the rights of the true owner therein and using it with his knowledge and consent.

In the case of *Schillinger v. The United States*, decided by the Supreme Court of the United States November 19, 1894, the Architect of the Capitol invited proposals for a concrete pavement in the Capitol grounds and entered into a contract with Cook for laying such pavement. He was admonished by the owners of the Schillinger patent that the pavement described in the contract with Cook was an infringement of the Schillinger patent; and upon a petition filed by the owners of the Schillinger patent in the Court of Claims it was held there and by the Supreme Court that if the pavement laid by Cook, under his contract, did embrace the Schillinger patent, that that at most was an infringement of such patent, and that the circumstances of the case did not raise a contract by implication. It was also held in that case that “when a contractor, in the execution of his contract, uses any patented tool, machine, or process, and the Government accepts the work done under such contract,” that it can not be said to have appropriated and be in possession of any property of the patentee in such a sense that the patentee may waive the tort and sue as on an implied promise.

Chinese Merchants—Return to United States.

Where loss and injury may result to the Government from the appropriation by its contractors of the patented inventions or other property of third persons it is desirable and practicable to require from the contractor, as part of his contract, or as collateral or supplementary thereto, a bond of indemnity, in a sufficient penalty conditioned to save the Government and all persons representing or acting for it against loss or injury arising from such wrongful use by the contractor of such patented device.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF AGRICULTURE.

CHINESE MERCHANTS—RETURN TO UNITED STATES.

Chinese merchants residing in the United States prior to November 3, 1893, can depart from and return to the United States under the same conditions as prevailed prior to the taking effect of the Chinese exclusion act approved May 5, 1892. (*Lee Kan v. United States*, 62 Fed. Rep., 914, cited, and opinion of May 14, 1894, *supra*, p. 21, reaffirmed.)

DEPARTMENT OF JUSTICE,

December 19, 1894.

SIR: I beg to acknowledge the receipt of your communication of the 4th instant, in which you refer to a difference of opinion between certain customs officers of the United States "as to the right of Chinese merchants to leave the United States to return thereto," and say that you have "called the attention of the officers at New York to your opinion of 14th of March last, wherein it was held that Chinese merchants residing in the United States prior to November 3, 1893, on which date the act entitled 'An act to amend an act entitled "An act to prohibit the coming of Chinese persons into the United States,"' approved May 5, 1892, took effect, were not affected by said law, and that they could depart and return to the United States under the same conditions as prevailed prior to the passage of said act."

You also call attention to the fact that the district court of the northern district of California has decided "that the

Chinese Merchants—Return to United States.

evidence required by the act approved November 3, 1893, shall be produced, notwithstanding the fact that the Chinese merchant may have departed from this country prior to the passage of said act."

You ask to be "advised whether or not appeals were taken from the decisions above referred to, and also if officers of this Department charged with the enforcement of the Chinese exclusion laws should continue to be governed by the opinion rendered by you, as hereinbefore stated, on March 14, 1894."

On May 21, 1894, the circuit court of appeals, ninth circuit, reversed the judgments of the district court for the northern district of California in the case of *Lee Kan v. United States* (62 Fed. Rep., 914).

I am now advised by the U. S. district attorney in California that in consequence of that decision the petitioners in the two cases to which you refer—*In re Yee Lung* and *In re Loo Yue Loon*, reported in 61 Federal Reporter, pages 641 and 643—have been discharged from custody.

I do not find in the records of this Department any opinion given by me on this subject on March 14, 1894. I do find, however, that on May 14, 1894, in reply to your letter of May 8, 1894, I did give an opinion, in which I said:

"I am constrained to the conclusion, therefore, that this third paragraph of section 2 of the act of November 3, 1893, is to be regarded as wholly prospective in its operation and as applying exclusively to Chinese merchants who both came into the United States for the first time since November 3, 1893, and having carried on business here, afterwards leave the country, and return, as if the act of November 3, 1893, had not been passed."

A reexamination of this opinion discloses to me no reason for recalling or modifying it.

I find that on May 14, 1894, a telegram was received by the Chinese minister in Washington from the Chinese Merchants' Exchange of San Francisco, calling his attention to this subject, and that on May 16, 1894, this telegram was communicated to you from the Secretary of State, and that on May 17, 1894, Mr. C. S. Hamlin, Assistant Secretary, etc.,

Customs Duties—Remitting Penalties—Practice.

by telegram, instructed the collector of customs at San Francisco as follows.

“ You are authorized to permit landing, without exacting stipulation from steamship company, of such of the forty Chinese now on vessel at your port as can prove to your satisfaction that they are merchants domiciled here and who left this country prior to November third last with intention of returning. This ruling in harmony with opinion rendered by Attorney-General.”

I see no reason why the course pursued with reference to the 40 Chinese referred to in that telegram should not be adopted as to all Chinese persons of a like class, and embodied in a general instruction to that effect to the collectors of customs at all the ports of entry. This would avoid the necessity of recourse to the courts by returning Chinese merchants in cases such as those referred to.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

CUSTOMS DUTIES—REMITTING PENALTIES—PRACTICE.

Section 17 of the anti-moiety act of June 22, 1874, supersedes section 5292, Revised Statutes, as to all cases arising under the customs-revenue laws, except those of vessels and merchandise seized or subject to seizure and of less value than \$1,000.

Penalties not over \$1,000 in customs-revenue cases may be remitted under section 5293, Revised Statutes, without a proceeding before the district judge.

Said limit of \$1,000 refers to the amount of the penalty to be remitted and not to the value of merchandise.

DEPARTMENT OF JUSTICE,

December 20, 1894.

SIR: Your letter of December 15 informs me that applications are pending before you for remission of penalties incurred under the provisions of section 7 of the customs administrative act of June 10, 1890, where the penalties amount to more than \$1,000, though the appraised value of the merchandise imported was less than \$1,000. You refer

Customs Duties—Remitting Penalties—Practice.

me to sections 5292 and 5293 of the Revised Statutes and sections 17 to 20 of the antimoiety act of June 22, 1874, chapter 391, and ask my official opinion whether you have authority to remit the penalties "without a petition having first been presented to the judge of the district in which the alleged violation occurred."

Your difficulty seems to have arisen from section 17 of the antimoiety act, which provides for a proceeding before the district judge instituted by petition of "any person who shall be charged with having incurred any fine, penalty, forfeiture, or disability other than imprisonment, or shall be interested in any vessel or merchandise seized or subject to seizure, when the appraised value of such vessel or merchandise is not less than \$1,000," this section being confined to matters arising under the customs-revenue laws. I do not think that this \$1,000 limit applies to anything besides vessels or merchandise seized or subject to seizure. I do not think, therefore, that it has any application to merchandise imported by reason of which the penalties of section 7 ~~above~~ referred to have been assessed.

Construing together the sections cited from the Revised Statutes, the act of February 27, 1877, chapter 69, amending those sections among others, and the antimoiety act, my conclusions are as follows: That section 17 of the antimoiety act supersedes section 5292 of the Revised Statutes as to all cases arising under the customs-revenue laws, except those of vessels or merchandise seized or subject to seizure and of less value than \$1,000 (see *In re Laidlaw*, 42 Fed. Rep., 401); that sections 19 and 20 of the antimoiety act, however, recognize the continued operation of section 5293 of the Revised Statutes in customs-revenue cases involving not over \$1,000; that the latter class of cases form, therefore, an exception to the general language of section 17 of the antimoiety act, and do not require a proceeding before the district judge, but that the limit of \$1,000, referred to in section 5293 of the Revised Statutes and in section 20 of the antimoiety act, refers to the amount of the penalty to be remitted, and not to the value of the merchandise whose importation led to the imposition of the penalty.

NAVAL OFFICER.

I therefore advise you that you are not authorized to remit the penalties now in question until after the proper proceeding before the district judge.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

NAVAL OFFICER.

Status of Commander Joshua Bishop considered, and *held*, that he must be regarded as still on the active list of the Navy.

DEPARTMENT OF JUSTICE,

December 21, 1894.

SIR: I have the honor to acknowledge yours of the 13th instant, by which it appears that Commander Joshua Bishop entered the Navy September 20, 1854; February 8, 1868, was dismissed from the service; pursuant to a joint resolution of Congress was reappointed lieutenant-commander by the President as of March 1, 1871; and, having applied August 22, 1894, to be put on the retired list, pursuant to section 1443 of the Revised Statutes, was notified by an order of the Acting Secretary of the Navy of September 13, 1894, that he should regard himself as detached from duty at the Naval Observatory on the 20th of said September, and from that date would be transferred to the retired list in accordance with the provisions of said section 1443. On this state of facts you make two inquiries:

First. Whether Commander Bishop, having been dismissed from the service February 8, 1868, and not restored till March 1, 1871, had on September 20, 1894, "been forty years in the service of the United States?" and,

Second. What is his present status?

1. I fully concur in the opinion of your Department, that September 20, 1894, Commander Bishop had not been in the service of the United States for forty years, and that on no theory can the period between February 8, 1868, and March 1, 1871, when he was not in fact in the naval service, be counted as part of said forty years. The act of March 3, 1883 (22 Stat., 472), which closes the gaps in intermittent

Pacific Railroad Companies.

service so as to make it operate as continuous, shows conclusively that actual service and none other is contemplated by the law.

2. I assume—it not appearing to the contrary in your communication—that there has been no appointment to the place on the active list supposed to be vacated by the attempt to put Commander Bishop on the retired list. On that assumption Commander Bishop must be regarded as still on the active list of the Navy—the retiring order above referred to having no effect upon his status, because of the nonexistence of the jurisdictional fact of forty years of actual service.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

PACIFIC RAILROAD COMPANIES.

Sundry questions as to the principles to be adopted in the settlement of accounts between the United States and the Pacific railroad companies answered.

DEPARTMENT OF JUSTICE,

December 21, 1894.

SIR: I have the honor to acknowledge yours of the 6th instant, relating to the accounts between the United States and the Pacific railroad companies, and submitting the following questions respecting the principles to be adopted in the settlement of said accounts:

“1. Whether, under the language of section 8 of the Thurman Act, the first mortgage bondholders have a lien prior to that of the United States on the sinking fund.

“2. Whether the whole amount falling due in January, 1895, of principal and interest, can be paid from the proceeds of the sinking fund, or only in the proportion which that amount bears to the whole amount of bonds to fall due hereafter with interest already advanced and paid by the Government.

“3. Whether the maturity of all the issues must be awaited before any claim is made on the sinking fund for the payment of any single issue and the interest accrued thereon.

“4. Whether a demand is necessary to fix the liability of the railroad company to reimburse the United States for the

Pacific Railroad Companies.

principal of the bonds which they failed to pay; and if so, how, when, and upon whom should such demand be made.

"5. Whether the method of accounting heretofore used in making up the account is correct, or whether all the credits should be charged against the debt as it matures, and not apportioned in the ratio which the issue falling due in January, 1895, bears to the whole issue."

Taking these questions in their order, I answer them, respectively, as follows:

1. The language of the Thurman Act, section 8, does not create a lien on the sinking funds prior to that of the United States in favor of first mortgage bondholders.

2 and 3. The entire sinking fund belonging to the Central Pacific, or its proceeds, may, if necessary, be used to pay the indebtedness of the Central Pacific to the United States maturing in January, 1895.

4. A demand upon the railroad company is not necessary to fix its liability to reimburse the United States for all sums paid by the latter on account of principal and interest of subsidy bonds.

5. I do not understand that the United States has thus far determined upon or adopted any method or rule in accordance with which the accounts between itself and the subsidized Pacific roads are to be stated and adjusted. If I am rightly informed, all that has been done is to charge each road with the amounts paid from time to time as interest on the subsidy bonds, and to credit it with the several amounts (1) earned from time to time by each road for transportation service, and (2) annually paid to the United States under section 6 of the act of 1862 as amended by section 5 of the act of 1864.

Whether the foregoing assumption be or be not correct, I shall, when requested, be ready to express an opinion either upon the correctness of such method of settling the accounts as the Treasury Department may have decided upon, or upon such method as in my judgment the Treasury Department should adopt.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

Sea Collisions—Construction of Act—Attorney-General.

SEA COLLISIONS—CONSTRUCTION OF ACT—ATTORNEY-GENERAL.

The Great Lakes are "high seas" within the meaning of the act of August 19, 1890, chapter 802.

The regulations for preventing collisions at sea in said act are applicable to the Great Lakes and to all waters navigable for seagoing vessels connecting therewith, or with the ocean, whether the connection be by a navigable river or canal, and are applicable to every kind of steam vessel. Rules 6 and 7 of section 4233, Revised Statutes, are thereby abrogated or repealed.

The Board of Supervising Inspectors of Steam Vessels have power to make regulations not inconsistent with the regulations aforesaid. Said Board is not a "local authority" within the meaning of section 30 of said act.

The Attorney-General can not give an official opinion except on a question presently arising.

DEPARTMENT OF JUSTICE,

December 22, 1894.

SIR: Your communication of December 10 asks my official opinion upon certain questions raised by the act of August 19, 1890, chapter 802, entitled "An act to adopt regulations for preventing collisions at sea," which statute is to take effect by proclamation of the President March 1, 1895.

This act commences by providing certain regulations which "shall be followed by all public and private vessels of the United States upon the high seas and in all waters connected therewith, navigable by seagoing vessels." Section 2 repeals all inconsistent regulations "for the navigation of all public and private vessels of the United States upon the high seas, and in all waters connected therewith navigable by seagoing vessels." This language in both places is new. It very materially differs from the language of the preceding act *in pari materia*, that of March 3, 1885, chapter 354.

In my opinion the questions asked by you should be answered as follows:

The Great Lakes are to be regarded as "high seas" within the meaning of this statute, whatever may have been the case under the act of 1885. (See *United States v. Rodgers*, 150 U. S., 249; *The North Star*, 62 Fed. Rep., 71, 75-76.) The new regulations are therefore applicable to all waters navigable for seagoing vessels and connected either with the ocean or with the Great Lakes. It is immaterial whether

Sea Collisions—Construction of Act—Attorney-General.

such connection is made by a navigable river or a canal. (See *Ex parte Boyer*, 109 U. S., 629.) What the standard seagoing vessel is may be a question of some doubt. (See *Belden v. Chase*, 150 U. S., 674, 695.)

The new regulations are applicable to every kind of steam vessels including ferry boats, coal boats, etc. The Board of Supervising Inspectors of Steam Vessels will, however, continue to have power to make such further "regulations to be observed by all steam vessels in passing each other as they shall from time to time deem necessary for safety." (Rev. Stat., sec. 4412.) These regulations must not be inconsistent with any of the regulations of the act of 1890, and should be drawn with great care to avoid embarrassment. (*The Grand Republic*, 16 Fed. Rep., 424; *The B. B. Saunders*, 19 Fed. Rep., 118; *The Lisbonense*, 53 Fed. Rep., 293, 298-299.)

Whether the present regulations of the Board of Supervising Inspectors will be superseded March 1, 1895, or whether they will continue in force without readoption by the Board is a question not presently arising in the administration of your Department. It is therefore not a question which I am authorized to answer. (18 Opin., 77.) If there is doubt the doubt may be dispelled by reenacting such regulations as are not inconsistent with the act of 1890.

In my opinion, Rules 6 and 7 of section 4233 of the Revised Statutes, relating to river steamers navigating waters flowing into the Gulf of Mexico and their tributaries, and to coasting steam vessels, etc., navigating the bays, lakes, rivers, or other inland waters of the United States, are abrogated or repealed by the act of 1890.

In addition to the special questions referred to, you ask in general for my "opinion as to the scope and force of article 30 and of section 2 of the act of August 19, 1890." I am not authorized to give any opinion as to the scope of a statutory provision, further than to answer questions which presently arise thereunder in your Department; nor do I perceive that any questions under article 30 of the act of 1890 arise in your Department. That article provides as follows:

"Nothing in these rules shall interfere with the operation of a special rule duly made by local authority relative to the navigation of any harbor, river, or inland waters."

Customs Administrative Act—Export Duty.

The "local authority" therein referred to does not, in my opinion, include the Board of Supervising Inspectors of Steam Vessels. I entirely concur in your view that "a plain provision of Congress, embodying the requisite rules for harbors, rivers, and inland waters, is desirable; but in the absence of such legislation it is important that the private persons concerned should know what is required of them." I do not think, however, that I can be asked to give this desired information, even were it in my power to do so. Congress is now in session, and will remain in session until after the act of 1890 takes effect. Whatever ambiguity is found in its provisions can meanwhile be remedied by the legislative branch of the Government. If there be ambiguity and it be not so remedied, I fear that the private persons concerned will be obliged to wait for the necessary information until some collision shall have occurred and the opinion of the courts thereon subsequently obtained in the ordinary course of admiralty proceedings. I can give no opinion that would protect them.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

CUSTOMS ADMINISTRATIVE ACT—EXPORT DUTY.

An export tax levied by a foreign Government is not one of the "costs, charges, and expenses," referred to in section 19 of the customs administrative act of June 10, 1890.

DEPARTMENT OF JUSTICE,

December 26, 1894.

SIR: Your communication of December 21 asks my official opinion whether an export tax imposed by a foreign Government upon merchandise subject here to an ad valorem rate of duty or to a duty based upon or regulated in any manner by the value of the merchandise is to be regarded as one of the "costs, charges, and expenses" referred to in section 19 of the customs administrative act of June 10, 1890.

Drawback—Oil Cake—Attorney-General.

While the point is not entirely clear, especially in view of the provisions of section 2907 of the Revised Statutes, now repealed, I am of the opinion that the export duty is not to be taken under consideration.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

DRAWBACK—OIL CAKE—ATTORNEY-GENERAL.

Under the tariff act of August 27, 1894, a drawback is allowable on oil cake made from imported linseed.

The Attorney-General can only advise on cases actually and presently arising. He can not undertake to give a general definition of a word applicable to all cases possibly arising.

DEPARTMENT OF JUSTICE,

December 27, 1894.

SIR: Your communication of December 19 asks my official opinion whether a drawback is allowable, under the tariff act of August 27, 1894, on oil cake made from imported linseed. You call to my attention arguments which have been submitted before you to the effect that such oil cake is not an article "manufactured or produced in the United States" within the proper construction of section 22 of that act.

Under the drawback provisions of the act of August 5, 1861 (chap. 45, sec. 4), this oil cake was held by the Treasury Department to be a manufactured article; and under that act its right to a drawback seems never to have been questioned. The claim for drawback upon oil cake under this section was carried to the Supreme Court and argued there by able counsel as late as 1882, but it seems to have been assumed without doubt that the oil cake was within the meaning of the act of 1861.

By the tariff act of July 14, 1870, chapter 255, it was specially provided that "no drawback shall be allowed on oil cake made from imported seed." This clause, as a proviso to the paragraph imposing a duty upon imported linseed or flaxseed, was repeated in the Revised Statutes and in the tariffs of 1883 and 1890. It remained in the tariff bill of 1894 as passed by the House of Representatives, but was

Drawback—Imported Lead.

stricken out by amendment in the Senate. (Cong. Rec., June 10, 1894, p. 7170.)

Under these circumstances, I think that the intent of Congress in the premises is clear, and that drawback upon this article is to be allowed.

My authority to advise you officially is confined to cases actually and presently arising in the administration of your Department. I can not, therefore, undertake to give a general definition, applicable to all cases possibly arising, of the term "materials," or the term "articles manufactured or produced," appearing in section 22 of the tariff act of August 27, 1894.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

DRAWBACK—IMPORTED LEAD.

Section 25 of the tariff act of October 1, 1890, applies only to articles made of two or more materials.

In a mass of lead, of which 90 per cent is foreign in origin, and 10 per cent domestic, the domestic lead can be regarded neither as a mere incident to the other nor as small enough in amount to be disregarded.

DEPARTMENT OF JUSTICE,

December 28, 1894.

SIR: Your communication of November 16, asking my opinion with relation to the claim of the Kansas City Smelting and Refining Company for drawback upon imported lead, has received my careful attention.

It appears that the lead in question was imported in the months of September, 1893, to March, 1894, inclusive, from the Republic of Mexico, contained in silver-lead ores known commercially as lead carbonates. Silver being the component material of chief value in these ores, they are regarded as silver ores, and the duty upon the lead therein contained was exacted under the proviso to paragraph 199 of the McKinley Tariff Act of October 1, 1890, chapter 1244, which proviso is as follows:

"That silver ore and all other ores containing lead shall pay a duty of 1½ cents per pound *on the lead contained therein*, according to sample and assay at the port of entry."

Drawback—Imported Lead.

It appears that this ore was of the kind known as fluxing ore, containing a large quantity of lead, and used in this country for the purpose of smelting in combination with the refractory or dry domestic ores; that is, ores containing little or no lead. It appears that the imported and domestic ores go together into the furnace. The main product in value is the silver. An important by-product, however, is lead. The lead in the ores which go into the furnace is about 90 per cent foreign and 10 per cent domestic. Some of this lead is wasted. It is presumable that the waste of foreign and domestic lead, respectively, is in the proportions above stated, and that therefore 10 per cent of the resulting by-product is domestic in origin. Each molecule of domestic lead being precisely like each molecule of foreign lead in this product, it is, of course, utterly impossible to distinguish between them by any examination of the completed article.

The importers claim a drawback under section 25 of the McKinley Act, which provides:

“That where imported *materials* on which duties have been paid, are used in the manufacture of *articles manufactured or produced in the United States*, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties.”

The section, however, contains the following important proviso:

“*Provided*, That when the articles exported are made in part from domestic materials, the imported materials, or the parts of the articles made from such materials shall so appear in the completed articles that the quantity or measure thereof may be ascertained.”

The importers claim that they have sufficiently complied with this proviso, because they have kept accurate records showing the amount of foreign lead and also the amount of domestic lead which went into the furnace, and because they are thus able to state the proportions of each in the mass of lead resulting from their operations with substantial accuracy. Your letter assumes, however, that this is not the case. You assume that the proviso forbids the allowance of a drawback except in cases where the article

Income Tax—Army Officers.

manufactured or produced can be so separated chemically or mechanically into its component materials that the relative proportions of each material may be ascertained without reference to past books of account. This assumption, in my opinion, is entirely correct. The section is intended to apply only to cases where an article is made of two or more different materials. The possible existence in commerce of a mere mixture or melting together of articles identically the same, though part domestic and part foreign, does not seem to have been contemplated by Congress. It is a *casus omissus*.

You ask my opinion "whether the presence of a slight incidental percentage of domestic lead in the metal entered for drawback should be regarded as a bar to the allowance thereof," or "whether the lead produced as above described may properly be considered as an article wholly manufactured from materials imported." I think that in no proper sense can any portion of the lead entered for drawback be regarded as incidental to any other portion thereof or to the whole. Nor is the proportion of domestic lead in the total product small enough to be disregarded. (*Magone v. Luckemeyer*, 139 U. S., 612.)

It is unnecessary, therefore, to consider the question whether this lead, in view of the various statutory provisions above quoted, is an "article manufactured or produced in the United States." (See *United States v. Hathaway*, 4 Wall., 404; *Junge v. Hedden*, 146 U. S., 233, 239; *Seeberger v. Castro*, 153 U. S., 32, 35; *Attorney-General v. Lorman*, 59 Mich., 157.)

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

INCOME TAX—ARMY OFFICERS.

In construing the new income-tax law, mileage and commutation of quarters paid to officers of the U. S. Army are to be considered as parts of the incomes of such officers, and are to be added to other income in order to ascertain the total income.

Income Tax—Army Officers.

The amount of the tax on the excess over \$4,000 of salary or compensation payable for the calendar year should be deducted by the paymaster or other disbursing officer of the Government from the first installment of salary or pay after the aggregate amount paid such officer in any calendar year has reached the sum of \$4,000.

DEPARTMENT OF JUSTICE,
January 2, 1895.

SIR: I have to acknowledge yours of the 13th ultimo, making the following inquiries respecting the construction and effect of the new income-tax law, to wit:

"1. Whether 'mileage and commutation of quarters' paid officers of the U. S. Army are to be considered as parts of the incomes of such officers;

"2. Whether, if they are to be so considered, they are to be added to, and held to be a part of, the salaries or 'payments for services' within the meaning of section 33 of the act and therefore to be taken account of by paymasters under said section; and

"3. Whether, in the case of an army officer subject to an income tax on his salary, the tax is to be collected in installments by deductions from his monthly pay or be collected in bulk annually and be based on the amount of salary received in the calendar year preceding the time of the collection of the tax."

Replying to these questions in their order—

First. The answer to the first question is found in Division V, page 33, "Regulations Relative to the Income Tax," just issued by the Treasury Department, wherein it is expressly provided that paymasters and disbursing officers shall deduct the 2 per cent "from all salaries and payments of every kind made in money to officers or other persons in the civil, military, naval, and any other employment in the service of the United States upon the excess of said salaries over the rate of \$4,000 per annum."

In this particular, and though the phraseology of the two statutes is not the same, the Treasury "Regulations" construe the existing law to be the same in meaning and effect as section 86 of the act of July 1, 1862 (see Treasury Regulations, Dec. 1, 1862), distinction being drawn between supplies in kind which are not assessable, and pecuniary payments

Income Tax—Army Officers.

which, though representing such supplies, are nevertheless assessable. This ruling of the Treasury Department has been promulgated since yours of the 13th ultimo, and will, I assume, be accepted as satisfactory.

Second. Under the existing statute a salary in excess of \$4,000 is taxable as such at the rate of 2 per cent upon the excess. If the recipient thereof has other income exceeding \$4,000 such excess is also taxable at the same rate. But if the salary or other compensation is \$4,000 or less, or is uncertain or irregular in amount, or in the time of its accrual or being earned, then nothing is taxed as salary, but the salary is one item of the total income which becomes taxable when exceeding \$4,000. The answer to the second question, therefore, is that commutation moneys received by an officer are to be added to other income (including a salary of \$4,000 or less) in order to ascertain the total income, the excess of which over \$4,000 is subject to a tax of 2 per cent.

Third. The third question seems to be completely answered by the following paragraph of income tax "Regulations," Division V, page 33:

"Paymasters and disbursing officers of the Government will make no deduction for taxes from the salary or pay of any officer or person in the employ of the United States for the year 1895 or thereafter, until the amount paid to any such officer or Government employé on account of such salary or employment has reached in the aggregate, for that calendar year, the sum of \$4,000, when, from the first payment on the excess of said amount, or any part thereof, the paymaster or disbursing officer making the payment shall deduct and withhold the tax of 2 per cent on the entire amount of such excess of salary or compensation payable to such officer or employé for said year. The excess upon which the tax of 2 per cent is payable shall be ascertained by deducting the sum of \$4,000 from the fixed annual salary or compensation."

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF WAR.

Modification of Contracts.

MODIFICATION OF CONTRACTS.

By virtue of his general authority, the Secretary of the Treasury has not the power to change binding contracts entered into with the United States by responsible parties, secured by responsible sureties, in the interest of private parties thereto, without consideration inuring to the Government.

The express stipulation in certain contracts that the Secretary of the Treasury may annul for cause, implies some fact or state of facts inducing or justifying an abrogation of the contract *for the benefit of the United States.*

DEPARTMENT OF JUSTICE,
January 7, 1895.

SIR: I have the honor to acknowledge your favor of the 29th ultimo, asking my opinion upon the question whether, in view of the facts and contracts accompanying your communication, the Secretary of the Treasury can lawfully modify certain contracts between the United States on the one hand and Messrs. Livingstone, French, and Silberman & Joseph on the other, whereby each of said parties, in consideration of certain rentals or other stipulated payments, secures for a term of years the enjoyment of certain exclusive privileges in connection with the immigrant station at Ellis Island. Your letter states that the parties "have prayed for relief under said contracts," and no suggestion is made, as I understand, that any variation of the existing contracts is desired on behalf of the United States or will be in its interest.

My attention is called to the fact that each contract contains an express stipulation that the Secretary of the Treasury may annul it for "cause." But by "cause," as used in each of said contracts, must be meant in all probability some fact or state of facts inducing or justifying an abrogation of the contract for the benefit of the United States. The right to break the contract can hardly have been reserved to the United States for the benefit of the contractor. Further, the desired changes in the existing contracts can not be accomplished by the process of first putting an end to them and then making others, since, being once canceled, new ones could be made only in a prescribed statutory method; that is, "after public competition."

Rates of Duty—Warehoused Merchandise.

The single legal issue presented, then, is whether the United States, having contracts with responsible parties, secured by responsible sureties, it is competent for the Secretary of the Treasury, by virtue of his general authority, to change those contracts in the interest of the private parties thereto without consideration inuring to the United States, and simply because unforeseen circumstances make the operation of their provisions unprofitable or even disastrous to such parties. Substantially the same question has recently been passed upon by this Department in the case of the North American Commercial Company. An abatement of the rentals due from the company to the United States, made on purely sentimental grounds and because such an abatement was thought to be equitable and fair between the parties, was held to be beyond the power of the Secretary of the Treasury. There seems to be no ground for doubting the soundness of that ruling, and the inquiry with which your letter concludes, "whether the Secretary of the Treasury has the power to grant the relief prayed," is therefore answered in the negative.

Returning herewith the nine inclosures accompanying your letter, I am

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

RATES OF DUTY—WAREHOUSED MERCHANDISE.

The new rates of duty imposed by the tariff act of August 27, 1894, do not apply to any goods theretofore entered for warehouse, unless the goods are withdrawn for consumption within three years from the date of original importation.

Goods imported before that act and then deposited in store as "unclaimed merchandise," under section 2965, Revised Statutes, may be withdrawn for consumption at the new rates of duty at any time within three years from the date of original importation, as long as they remain unsold. If sold, however, the duties to be deducted from the proceeds of sale are those of 1890.

DEPARTMENT OF JUSTICE,

January 17, 1895.

SIR: Your communication of December 26 asks my official opinion as to the rates of duty chargeable on certain goods

Rates of Duty—Warehoused Merchandise.

which were originally imported while the provisions of the tariff act of 1890, chapter 1244, were still in force, but which goods remained in custody of the Government until after the passage of the tariff act of 1894, chapter 349. I understand your questions to relate to goods still dutiable, but upon which the rate of duty has been changed by section 1 of the latter act. The goods you describe are resolvable into two classes.

First, those which have been entered for warehouse and deposited in bond prior to the act of 1894, but not withdrawn for consumption within three years from the date of original importation. Section 54 of the tariff act of 1890 (superseding section 2970 of the Revised Statutes) provides as follows: "That any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided*, That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles." Section 2971 of the Revised Statutes provides, among other things, as follows: "Any goods remaining in public store or bonded warehouse beyond three years shall be regarded as abandoned to the Government, and sold under such regulations as the Secretary of the Treasury may prescribe, and the proceeds paid into the Treasury." Under prior tariff acts the question has arisen whether the provision last quoted transfers to the Government the ownership of the abandoned goods, subject to a discretionary power of remission under section 2972, similar to that given by sections 5292, 5293, 1841, 2858, 3001, 3078, 3461, etc., or whether the goods are to be regarded as still warehoused for the benefit of the importer until the Government shall foreclose its lien by selling them. There is no such question, however, under the tariff act of 1894. By the express language of section 1 of that act, the new rates apply not to all warehoused goods, as by section 50 of the act of 1890, but only to "articles [thereafter] imported from foreign countries or withdrawn for consumption." The latter clause should be

Rates of Duty — Warehoused Merchandise.

construed with the prior legislation above quoted so as to constitute a harmonious whole.

In my opinion, therefore, goods imported and entered for warehouse prior to the act of 1894, and not withdrawn for consumption within three years from the date of original importation, are unaffected by the new rates of duty, and the "duties" mentioned in section 2972 of the Revised Statutes are the duties to which they were previously subject, whatever be the construction to be put upon this section in other respects. My opinion applies not only to goods imported within three years before the act of 1894 took effect, but to all goods theretofore imported and then subject to the tariff rates of 1890.

The second class of goods to which you refer are those not entered by the importer either for warehouse or consumption, but deposited in store as "unclaimed merchandise" under the provisions of section 2965 of the Revised Statutes. These goods, like the others, are regarded as abandoned to the Government after three years (sec. 2971). There is no other limitation, however, upon their entry for warehouse or consumption so long as they remain in the custody of the Government. In my opinion, therefore, so long as they remain unsold, they may be withdrawn for consumption upon payment of the new rates of duty at any time within three years from the date of their original importation. If sold, however, under the provisions of section 2973, they can, of course, no longer be withdrawn for consumption; wherefore the new rates of duty are inapplicable, and the duties to be deducted from the proceeds of sale by the terms of that section are those of 1890. As merchandise of this class is directed to be sold after one year, I assume that there is none now in your hands unsold which is not withdrawable by the importer.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

"Special-Request" Envelopes.

"SPECIAL-REQUEST" ENVELOPES.

The provisions of the proviso contained in section 96 of the act of Congress, approved January 12, 1895 (Public, No. 15) when construed in connection with Revised Statutes, section 3915, constitutes no substantial limitation upon the power to print and supply "special-request" envelopes.

One statute should not be held to have been impliedly repealed by another, unless the inconsistency and antagonism between the two was such that they could not stand together.

DEPARTMENT OF JUSTICE,

January 18, 1895.

SIR: I have the honor to acknowledge yours of the 16th instant calling my attention to a proviso contained in section 96 of an act of Congress approved on the 12th instant (Public, No. 15), which proviso reads as follows: "*Provided, That no envelope furnished by the Government shall contain any business address or advertisement.*" You inquire whether this proviso applies to and prevents your Department from supplying in the future what are technically known as "special-request envelopes."

To give the proviso that effect would be to repeal by implication the provisions of section 3915 of the Revised Statutes. While one statute may impliedly repeal another, the inconsistency and antagonism between the two must be such that they can not stand together. Otherwise, if by any fair and reasonable construction the provisions of both can be given a harmonious operation, that construction is to be adopted, and there is no repeal.

Further, it is plain from other legislation on the subject that when Congress did intend a repeal of that part of section 3915 now in question, it realized what provisions were required to unquestionably accomplish that result, and adopted them accordingly. Thus the act of July 13, 1892, enacted as follows: "*Provided, That it shall not be lawful after the thirtieth day of September, 1894, for the Postmaster-General to have requests for the return of letters printed upon any envelope sold by any postmaster or by the Post-Office Department.*" It is only reasonable to infer that if Congress had attempted to reach the same result by the above-quoted proviso to the act of 1895, it would have adopted the same or equivalent provisions.

Naval Reservation—Restoration to Public Domain.

The foregoing considerations clearly indicate that the proviso to the act of 1895 should, if it can reasonably be done, receive such an interpretation as will not interfere with the legitimate operation of section 3915. Such a construction, in my judgment, is not only feasible, but is the just and true construction. When the proviso prohibits the furnishing of Government envelopes containing a "business address or advertisement," the thing aimed at is not "special-request envelopes" proper, but envelopes which, purporting to be such, are disingenuously and improperly made the advertising mediums of some trade or business. In other words, what is condemned is not the use of "special-request envelopes" for their true purposes, but the abuse of them for other purposes not contemplated. In this particular the proviso to the act of 1895 is entirely in accord with section 3915. That section expressly declares that "No stamped envelope furnished by the Government shall contain any lithographing or engraving nor any printing, except a printed request to return the letter to the writer." The proviso to the act of 1895 is simply a more specific enactment, intended to accomplish the same general end as the first clause of this provision of section 3915.

My conclusion, therefore, is that the proviso of the act of 1895 constitutes no substantial limitation upon the power of your Department to print and supply "special-request envelopes," and has no other end or aim than to guard against a real or apprehended abuse of that power.

Very respectfully,

RICHARD OLNEY.

The POSTMASTER-GENERAL.

NAVAL RESERVATION—RESTORATION TO PUBLIC DOMAIN.

Congress alone is competent to subject to general governmental uses land heretofore reserved from the public domain for the use of the Navy Department.

DEPARTMENT OF JUSTICE,
January 19, 1895.

SIR: I have the honor to acknowledge yours of the 17th, inquiring whether the lands lying within the States of Alabama and Mississippi reserved from the public domain for the use of the Navy Department by order of the President

Duty on Sugar taken from Wreck.

pursuant to an act of Congress can now be restored to the public domain by Executive order without Congressional action.

In my judgment, an order of the President is not sufficient. Congress alone is competent to exercise the discretion by which the land in question shall cease to be held for the special purposes of the Navy Department and be made subject to general governmental uses.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

DUTY ON SUGAR TAKEN FROM WRECK.

Section 2928, Revised Statutes, only applied to goods wrecked while on the voyage to the United States. Whether that section was repealed by the customs administrative act of June 10, 1890. *Quare.*

DEPARTMENT OF JUSTICE,

January 21, 1895.

SIR: On June 1, 1894, the vessel *Windsor* sailed from Iloilo, in the Philippine Islands, with a cargo of sugar for the United States. On the following day the vessel was wrecked. The sugar was taken back to Iloilo and the vessel repaired. On October 9, the sugar having been again loaded on the same vessel, it sailed from Iloilo for the second time.

The importers of the sugar claim the right to have it appraised under section 2928 of the Revised Statutes as merchandise taken from a wreck. You ask my opinion whether the sugar is so classifiable.

Assuming that the vessel was a wreck in June, nevertheless the wreck did not occur in the course of the voyage which ended in the importation of these goods into the United States. I do not think, therefore, that the sugar comes within the purview of section 2928. It is consequently unnecessary to consider the question whether, as assumed by the editors of the Supplement to the Revised Statutes, that section has been repealed by the customs administrative act of June 10, 1890, section 23.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

Commissioner of Patents—Rules.

COMMISSIONER OF PATENTS—RULES.

It will not be unlawful for the Commissioner of Patents, with the approval of the Secretary of the Interior, to promulgate a rule limiting appeals to six months from the time when the matter is in condition for appeal.

DEPARTMENT OF JUSTICE,
January 29, 1895.

SIR: I beg to acknowledge the receipt of your letter of January 19, inclosing a copy of a communication addressed to you by the Commissioner of Patents, "wherein he propounds certain questions as to the power of the Commissioner of Patents, with the approval of the Secretary of the Interior, to make and enforce such rules as will require of applicants of patents for inventions greater diligence and the more rapid prosecution of their claims."

You say: "Before answering the Commissioner's questions I have deemed it proper to submit the matter to you for your consideration, and respectfully request that I be furnished with your opinion on the questions in the letter herewith inclosed."

The communication of the Commissioner of Patents submits to you the form of a "proposed rule" designed to prevent the recurrence of the evil complained of, and the question submitted by him to you is:

"Has the Commissioner power to make rules, subject to the approval of the Secretary of the Interior, providing that no appeal will be entertained by any tribunal in the office unless taken within six months from the action which puts the case in condition for appeal, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable?"

I beg to say in reply that a rule or regulation made by the Commissioner of Patents and adopted and approved by the Secretary of the Interior, under section 483, Revised Statutes, is a "regulation prescribed by the head of a Department," within the meaning of section 161, Revised Statutes, and that every such regulation, when "not inconsistent with law, has the force of law and is taken judicial notice of by the courts." (*Ex parte Reed*, 100 U. S., 13.)

Chinese.

Section 4894, Revised Statutes, is as follows:

"All applications for patents shall be completed and prepared for examination within two years after the filing of the application; and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall be given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

This appears to be the only provision of law as to the limitation upon the time of completing an application for patent.

I do not think that the proposed rule submitted by the Commissioner of Patents in his communication is inconsistent with the law or beyond his power under the authority given him to prescribe regulations for the conduct of proceedings in the Patent Office.

The communication of the Commissioner of Patents is herewith returned.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE INTERIOR.

CHINESE.

A certificate of naturalization issued to a Chinese person by the circuit court of the district of Montreal, Canada, and a passport issued by the Governor-General of Canada, upon which the right is claimed as a merchant to enter into and travel through the United States, can not be accepted as a substitute for the certificate prescribed by section 6 of the act approved July 5, 1884.

DEPARTMENT OF JUSTICE,

January 30, 1895.

SIR: I have yours of the 28th instant, from which it appears that a Chinese person named Lee Bow, now at Montreal, Canada, claims the right as a merchant to enter into and travel through the United States on a certificate of naturalization issued to him by the circuit court of the district of Montreal, Canada, and a passport issued by the Governor-General of Canada.

Life-Saving Medals.

You inquire whether the papers above mentioned may be properly accepted in lieu of the certificate prescribed by section 6 of the act approved July 5, 1884, amending an act entitled "An act to execute certain treaty stipulations relating to Chinese, approved May 6, 1882," and you inclose an opinion given by the Solicitor of the Treasury to the effect that the papers referred to can not be accepted as a substitute for such certificate.

I concur in the opinion expressed by the Solicitor of the Treasury.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

LIFE-SAVING MEDALS.

The phrase "saving persons from drowning," for which, by section 12 of the act to organize the Life-Saving Service, approved June 18, 1878, the Secretary of the Treasury is authorized to bestow the life-saving medal of the second class, has reference to the rescue of persons who are subjected to the perils of the sea in any of the waters of the United States and in the vicinity of any life-saving station, lifeboat station, or house of refuge, either by shipwreck, or from being upon or connected with any vessel in distress.

Such medals of honor can not be awarded to any other persons than those who are members of the regular or volunteer life-saving crew.

In construing a doubtful passage in a statute, resort can be had to the immediate context and the legislation in *pari materia*.

DEPARTMENT OF JUSTICE,

January 30, 1895.

SIR: I beg to acknowledge the receipt of your letter of the 21st instant, transmitting the papers in three cases now pending in your Department, to wit, that of John W. Kelly, for the rescue of Gustav Heffler, that of Everett Bates, for the rescue of Mary Dout, and that of Frank Sweezey, for the rescue of two boys; and requesting my opinion "on the proper construction of section 12 of the act to organize the Life-Saving Service, approved June 18, 1878, in the following particulars."

The "particulars" are stated in a series of questions propounded in your letter, which I will endeavor to answer in

Life-Saving Medals.

the order in which they are stated, without repeating the questions here.

It may be well to notice generally that the legislation under which a few life-saving stations were established on the coast of Long Island and New Jersey many years ago has since then extended so far as to establish a general Life-Saving Service, under which life-saving stations are now established on all the lake and sea coasts of the United States; and ample provision is made for an adequate supply of apparatus and crews at all of such stations.

This body of legislation comprises a great many separate acts passed at nearly every session of Congress during the past twenty years, and it will be observed that careful regard has not always been had to perspicuity and accuracy of expression in these acts, and from this cause has arisen the doubt which your letter expresses as to the true meaning and intent of Congress in certain sections of these acts.

One simple and obvious rule of construction is to cast upon the doubtful passage all the light which the immediate context and all the legislation *in pari materia* afford.

Your first inquiry is:

“Does the word ‘persons,’ in the clause of said section which reads as follows: ‘And saving *persons* from drowning,’ extend to or enlarge the class of persons, or apply to other persons than those embraced in the word ‘shipwrecked,’ in the clause immediately preceding the clause just quoted, as follows: ‘In rescuing and succoring the shipwrecked’? Or does said first-named clause extend the scope of the latter to other than shipwrecked persons; and if so, to what other persons does it refer?”

Section 12 of the act of June, 1878, is as follows:

“That the Secretary of the Treasury is hereby authorized to bestow the life-saving medal of the second class upon persons making such signal exertion in rescuing and succoring the shipwrecked and saving persons from drowning as, in his opinion, shall merit such recognition.”

The legislation on the subject of Life-Saving Service will be found collated in a note at the bottom of page 190 of the Supplement to the Revised Statutes.

Life-Saving Medals.

The enacting clause of the act of June 20, 1874, is as follows:

"That the Secretary of the Treasury is hereby authorized to establish life-saving stations, life-boat stations, and houses of refuge, for the better preservation of life and property from shipwreck, at or in the vicinity of the following-named points upon the *sea and lake coasts of the United States.*"

And the enacting clauses of the acts of June 18, 1878, of May 4, 1882, of June 19, 1886, and indeed of all subsequent acts, are substantially the same.

Again, the Secretary of the Treasury is authorized to employ crews of experienced surfmen at such of the stations as he may deem necessary and proper; and he is also authorized to accept the services of volunteer crews at any of the lifeboat stations herein authorized.

Again, the Secretary of the Treasury is directed to have prepared medals of honor to be "~~bestowed upon any persons~~ who shall hereafter endanger their own lives in saving or endeavoring to save lives from perils of the sea, within the United States or upon any American vessel."

And in section 10 of the act of June 18, 1878, provision is made for "extending the compensation of enrolled members of volunteer crews of lifeboat stations therein named to occasions of actual and deserving service *at any shipwreck or in the relief of any vessel in distress,*" etc.

From all which legislation it appears—

First. That the authority of the Secretary of the Treasury is to establish these life-saving stations, etc., "*at points upon the sea and lake coasts of the United States.*" That is, on waters over which the United States has jurisdiction by virtue of its authority to regulate interstate and foreign commerce, and not upon any other waters.

Second. That the means provided are, crews of experienced surfmen and volunteers. The field of their duties is necessarily confined to the vicinity of the life-saving stations at which they are appointed to serve.

Third. The service to be performed is "*at any shipwreck or in the relief of any vessel in distress.*"

I think, then, that the two terms employed in section 12, to wit, "*succoring the shipwrecked*" and "*saving persons*

Life-Saving Medals.

from drowning," were intended to embrace those persons, and only those, who were suffering from the perils of the sea, either by actual shipwreck or from being upon or connected with any vessel in distress.

One may, without too great refinement, perceive how a person may be suffering at sea from the effect of shipwreck and yet be in no immediate danger of drowning—in an open boat at sea without provisions, etc.—and that may have been in the mind of the framer of this section and led to the employment of these two forms of expression.

Your next inquiry is:

"Does the statute apply to the rescue or saving from drowning of persons who accidentally fall from public or private docks, wharfs, or other places into the waters of harbors, landings, or other waters of the United States; or to such persons likely to drown in such waters from the capsizing of any skiff, row, sail, or other small boat, not connected with ships or commerce; or who may accidentally fall or be precipitated overboard from any steamboat or other vessel plying the waters of the United States; or to such persons as may be drowning or about to drown while bathing in any such waters?" etc.

I think the statute applies to those only who, in the vicinity of any life-saving station, lifeboat station, or house of refuge, are in danger of drowning in any of the waters of the United States.

Your next inquiry is:

"Do the statutes relating to the award of any of the life-saving medals in cases where the accident or casualty or the person saved come within their contemplation yet still limit or restrict the persons making the rescue to any particular class of persons with reference to their calling or occupation?"

I take that question to mean simply whether those medals of honor can be awarded to any other persons than those who are members of the regular or volunteer life-saving crew.

The question is not without difficulty.

Section 7 of the act of June 20, 1874, provides that such medals of honor "shall be bestowed upon *any* persons who shall hereafter endanger their own lives in saving or endeavoring to save any person from drowning."

Meat Inspection—False Label.

oring to save lives from perils of the sea within the United States or upon any American vessel."

Now the term "any persons," taken alone, is certainly as comprehensive as any form of expression can be. And yet, that it is not safe to rely upon the form of expression alone is shown by the next preceding section of the act, which provides that—

"Such volunteers, * * * for every occasion upon which they shall have been instrumental in saving human life, shall receive such of the medals herein authorized as they may be entitled to under the provisions hereinafter made."

Yet surely, by the expression "every occasion upon which they shall have been instrumental in saving human life," was not intended to embrace occasions that arose upon land, but must be limited to occasions arising in the discharge of their duty as a life-saving crew on the sea or lake coast.

I think the true meaning and intent of the statute was to cause such medals of honor to be bestowed upon the members, whether regular or volunteer, and whether permanent or temporary, of the life-saving crews.

Finally, by "perils of the sea" is meant "all losses which occur from maritime adventures." (*Hazard's Admr. v. New England M. I. Co.*, 8 Pet., 557.)

In cases of marine insurance the term receives a much more restricted meaning, but in its larger sense it embraces every danger to which person and property are exposed at sea and from which they would be free on land.

Herewith I return the inclosures with your letter of the 29th instant.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

MEAT INSPECTION—FALSE LABEL.

Congress has not provided for the punishment of persons who falsely state in a label placed upon canned meat that the meat contained in the can has been inspected according to law.

Attorney-General—Reimportation of Liquors.

DEPARTMENT OF JUSTICE,
February 4, 1895.

SIR: I am in receipt of your favor of the 31st ultimo, calling attention to a label for canned corned beef used by Mr. William Manning Hardy, of Victor, Cal., which label contains the statement that the meat contained in the can has been inspected according to law enacted by Congress March 3, 1891, regulating inspection of meats. I understand you to say that this statement is an entire misrepresentation and to inquire whether or not it can be made the subject of a criminal prosecution.

I regret to say that a careful examination of the statutes of the United States fails to show that Congress has provided for the punishment of such a fraud as that committed by the false statement contained in the label above referred to.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF AGRICULTURE.

ATTORNEY-GENERAL—REIMPORTATION OF LIQUORS.

Questions of fraud, or intent or colorableness in a transaction are questions of fact not within the authority of the Attorney-General to determine.

Whether goods exported was immediately reimported, in order to evade a provision of the customs laws, are an "original importation".—*Quære.*

DEPARTMENT OF JUSTICE,
February 5, 1895.

SIR: Your communication of December 6, asking my official opinion as to the reimportation of certain liquors at the port of Ogdensburg, has received my careful attention. It appears that the goods in question were imported and entered for warehouse November 14, 1891; that they were withdrawn for exportation in the regular way on November 13, 1894, and exported across the St. Lawrence River to Prescott in Canada; that proper papers for reimportation were then obtained, and they came back on the next boat

Discharge from Army—Certificate.

from Prescott, and a new warehouse entry was made November 17, 1894. You ask me "whether or not the case presented by the special inspector should be regarded as a mere colorable transaction in which there was no real exportation and importation of the goods?"

Whether the good faith of any such transaction can be reviewed by the Treasury Department was a question referred to by me in my opinion of May 19, 1894, with relation to certain wool reimported at Philadelphia, but it was not found necessary to give an answer. The question turns upon the definition of the phrase "original importation" in section 2971 of the Revised Statutes. This topic has been recently the subject of discussion by the Supreme Court (*Saltonstall v. Russell*, 152 U. S., 628; *Seeberger v. Schweyer*, 153 U. S., 609), but the question whether goods exported for the mere purpose of extending the three years' warehousing period provided by the statutes, and immediately reimported, can be regarded on the second arrival as an "original importation" is still an open one. It is a question which, in view of the opinions of my predecessors (14 Opin., 574; 17 Opin., 579; 18 Opin., 381), should, I think, be left to the courts to decide.

Whatever the true construction of this phraseology may be, the advice which you ask is not within my authority to give. The transaction described by you may bear the most distinct marks of an intent to evade the statute. But such an intent would be a fraud on the statute. Questions of fraud or intent or colorableness in a transaction are in so far questions of fact that by familiar principles they are not within my authority to determine.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

DISCHARGE FROM ARMY—CERTIFICATE.

The Fifty-eighth Pennsylvania Regiment of Militia was not in the military service of the United States in such sense as to entitle Capt. Frederick Huidekoper to a certificate of discharge from the United States.

Indian Depredation Judgments.

DEPARTMENT OF JUSTICE,

February 6, 1895.

SIR: I have the honor to acknowledge yours of the 12th ultimo, requesting my opinion upon the question whether Frederick Huidekoper, of the Fifty-eighth Pennsylvania Regiment of Militia, is entitled to a certificate of discharge from the military service of the United States.

It is to be assumed, as I understand, that the state of facts respecting the Fifty-eighth Pennsylvania Regiment is the same as that existing in the cases of the Thirty-sixth and Fifty-fifth Pennsylvania Regiments, respectively, and considered by Acting Judge-Advocate-General Lieber in his opinion of September 12, 1890. If that assumption is correctly made, then I concur in the legal result reached by the Acting Judge-Advocate-General, and am of the opinion that the Fifty-eighth Pennsylvania Regiment of Militia can not be regarded as having been so far and in such sense in the military service of the United States as that Captain Huidekoper's request for a certificate of discharge should be acceded to.

I return the inclosures of yours, and remain,
Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF WAR.

INDIAN DEPREDAATION JUDGMENTS.

The President is not charged with any power or duty of approval or disapproval respecting the payments of Indian depredation judgments from annuities and property of Indians or from appropriations on their account, but all authority and discretion in the premises are vested in the Secretary of the Interior.

DEPARTMENT OF JUSTICE,

February 6, 1895.

SIR: In the matter of the application of the Secretary of the Interior for your approval of the payment of Indian depredation judgments against the Osage Indians from the interest on the proceeds of their lands in Kansas and for

Indian Depredation Judgments.

your approval of the payment of Indian depredation judgments against the Ute Indians from a trust fund held by the United States for the benefit of the Ute Indians under the fifth section of the act of June 15, 1880, I have the honor to report as follows:

Section 12 of the act of July 15, 1870, referred to by the Secretary, provides that the annual interest on the proceeds of sale of the Osage Indian lands shall be "expended by the President for the benefit of said Indians in such manner as he may deem proper." But section 4 of the same statute distinctly declares "that no part of the moneys appropriated by this act or which may hereafter be appropriated in any general act or deficiency bill making appropriations for the concurrent and contingent expenses of the Indian Department, to pay annuities due to, or to be used and expended for the care and benefit of, any tribe or tribes of Indians named herein, shall be applied to the payment of any claim for depredations that may have been or may be committed by such tribe or tribes, or any member or members thereof; and no claims for Indian depredations shall hereafter be paid until Congress shall make special appropriation therefor." It is apparent, therefore, that payments of Indian depredation claims can not be regarded as payments for the "benefit" of the Osage Indians within the meaning of said section 12, and can not be authorized by the President under its terms.

The same considerations apply in the case of the Ute Indians, and the annuity secured to them by the fifth section of the act of June 15, 1880. Though the President is directed by said section to disburse or invest the annuity for the use and benefit of the Ute Indians forever at his discretion, the section must be interpreted not independently but in connection with section 2098 of the Revised Statutes, which is the same in substance and effect as section 4 of the act of July 15, 1870, already above cited. The presumption is against any repeal of section 2098 by the act of June 15, 1880, and the only reasonable construction of the two statutes taken together is that the satisfaction of Indian depredation judgments is something not for the "use and benefit" of the Ute Indians as Congress used those terms in the act of 1880.

Attorney General—Cuts of Foreign Postage Stamps.

The payment of such judgments against an Indian tribe is, however, specifically provided for by section 6 of the act of March 3, 1891, which the Secretary of the Interior in his communication to you quotes verbatim and by which they are to be paid by the United States, are to be charged against the Indian tribe concerned, and thereafter are to be deducted from any annuities, funds, or appropriations either then or thereafter belonging to such tribe or inuring to its benefit. But the act of August 23, 1894 (Stat. 1894, chap. 307), enacts that the deductions provided for by section 6 of the act of 1891 are to be ascertained and duly certified by the Secretary of the Interior to the Secretary of the Treasury, and further declares that "such deductions shall be made according to the discretion of the Secretary of the Interior, having due regard to the educational and other necessary requirements of the tribe or tribes affected; and the amounts paid shall be reimbursed to the United States at such times and in such proportions as the Secretary of the Interior may decide to be for the interests of the Indian service." To the same effect is section 5 of the act of July 28, 1892 (Stat. 1892, chap. 311.)

The inevitable result would seem to be, therefore, that the President is not charged with any power or duty of approval or disapproval respecting the payments of Indian depredation judgments from annuities and property of Indians or from appropriations on their account, but that all authority and discretion in the premises are vested in the Secretary of the Interior.

Very respectfully,

RICHARD OLNEY.

The PRESIDENT.

ATTORNEY-GENERAL—CUTS OF FOREIGN POSTAGE STAMPS.

The Attorney-General can not give an official opinion regarding the act of May 16, 1884, chapter 52, or the provisions of the act of February 10, 1891, chapter 127, except section 4, because they relate only to criminal proceedings, and whether or not a crime has been committed is a question that in but rare instances can arise except in the Department of Justice.

Whether certain material or apparatus come within the scope of the fourth section of the act of 1891 is a question of fact, and an opinion thereon is declined.

Attorney General—Cuts of Foreign Postage Stamps.

DEPARTMENT OF JUSTICE,

February 12, 1895.

SIR: I have the honor to acknowledge your communication of February 7, asking my official advice as to whether certain "cuts and plates adapted to and used for the making of sketches and pictures of foreign postage stamps" come within the terms of the act of May 16, 1884, chapter 52, "to prevent and punish counterfeiting within the United States of notes, bonds, or other securities of foreign Governments;" or within the terms of the act of February 10, 1891, chapter 127, "further to prevent counterfeiting or manufacture of dies, tools, or other implements used in counterfeiting," etc.

I am not authorized to give you an official opinion regarding the act of 1884, because that act relates only to criminal proceedings. Whether or not an act constitutes a crime is a question that in but rare instances can arise except in the Department of Justice. If there is reason to suppose that acts coming to the attention of another Department are criminal in their nature, it is the duty of that Department to report these acts to the proper officials of the Department of Justice. It becomes, then, the duty of this Department to consider whether or not the matter should be brought to the attention of the courts. Criminal prosecutions are conducted by U. S. attorneys, who are officers of this Department and who are under the supervision, in nearly all matters, of the Attorney-General. There are, indeed, rare instances (of which this is not one) where the U. S. attorneys are placed under your supervision instead of under mine. Such an instance was the Cutajar case. (20 Opin., 715.) Even in such cases, however, the question whether certain acts constitute a crime could not be presented in such a way as to warrant an official opinion from the Attorney-General in the premises. The question presented to you in cases like that of Cutajar, and to me in most cases, where prosecutions for crime are under consideration, is whether there is sufficient probability of securing a verdict to warrant a prosecution. This is not a question of pure law. I must, therefore, refrain from giving my opinion on this case for the same reasons which compelled my refraining from giving an opinion upon the advis-

Arkansas—Interest on Bonds.

ability of instituting a civil suit to recover money due the United States. (20 Opin., 714; see also 19 Opin., 56, 670; 20 Opin., 277, 314, 539, 702.)

My predecessor declined to advise the then Secretary of the Treasury whether certain articles were in violation of these acts of 1884 and 1891. (20 Opin., 210.) I think that his declination was proper; and therefore the opinions which were rendered to you on December 30, 1893, and January 16, 1894 (20 Opin., 691, 697), except so far as they may bear upon the statutory provision below cited, must be regarded as extra-official.

The same remarks apply to the provisions of the act of February 10, 1891, except those of section 4. That section authorizes any authorized agent of the Treasury Department to seize "all counterfeits of any of the obligations or other securities of the United States. or of any foreign Government, or counterfeits of any of the coins of the United States, or of any foreign Government, and all material or apparatus fitted or intended to be used or that shall have been used in the making of any of such counterfeit obligations or other securities or coins hereinbefore mentioned, that shall be found in the possession of any person without authority from the Secretary of the Treasury or other proper officer to have the same."

I can not advise whether the material or apparatus now under consideration comes within the scope of this statutory provision, because such advice would involve my deciding questions of fact, such as similitude (20 Opin., 697, 698), intent (Opin. of Feb. 5, 1895), or fitness for a particular use.

Very respectfully

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

ARKANSAS—INTEREST ON BONDS.

Certain interest-bearing bonds of the State of Arkansas held not to bear interest after maturity. (*United States v. North Carolina*, 136 U. S., 211, followed.)

Foreign Postage Stamps—Counterfeiting.

DEPARTMENT OF JUSTICE,
February 14, 1895.

GENTLEMEN: I have the honor to acknowledge your joint communication of the 12th instant, calling my attention to certain coupon 6 per cent interest-bearing bonds of the State of Arkansas, all dated January 1, 1838, and a portion of which matured October 26, 1861, and another portion January 1, 1868. A copy of one of said bonds is inclosed, and you inquire whether the State of Arkansas is liable for interest on said bonds from and after their maturity.

In my judgment the question must be answered unhesitatingly in the negative. The rule laid down in the case cited by you (*United States v. North Carolina*, 136 U. S., 211) has been explicitly declared to be the law of Arkansas by the highest court of that State; and I find nothing in the terms of the bonds themselves, or in any legislation of Arkansas, having any tendency to show that the State has consented to pay interest on the principal of these bonds after such principal became payable.

Respectfully,

RICHARD OLNEY.

The SECRETARIES OF THE TREASURY
AND OF THE INTERIOR.

FOREIGN POSTAGE STAMPS—COUNTERFEITING.

A counterfeit of an uncanceled foreign postage stamp is within the meaning of the phrase "obligations or other securities * * * of any Government" in section 4 of the act of February 10, 1891, chapter 127.

DEPARTMENT OF JUSTICE,
February 18, 1895.

SIR: I have the honor to acknowledge your communication of February 15, asking my official opinion whether the counterfeit of an uncanceled foreign postage stamp comes within the meaning of the phrase "obligations or other securities * * * of any foreign Government" in section 4 of the act of February 10, 1891, chapter 127. I have already advised you that an uncanceled domestic postage stamp is an obli-

Supplies for Public Printer.

gation or security of the United States. (20 Opin., 697.) That advice was largely based upon section 5413 of the Revised Statutes, which does not apply to foreign representatives of value. I think, however, that the words "obligations or other securities" should be given the same meaning in the act of 1891, whether domestic or foreign, and therefore answer your question in the affirmative.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

SUPPLIES FOR PUBLIC PRINTER.

Revised Statutes, section 3709, inhibiting purchases and contracts for supplies by the Departments of the Government except after due advertisement for proposals, did not apply to paper and materials for the Government Printing Office, and the acts amendatory of the section (Jan. 27, 1894, chap. 22, and Apr. 21, 1894, chap. 61, pp. 33, 62; Stat. 1893-94) enlarged it in respect to this office only so as to apply to fuel, ice, stationery, and miscellaneous supplies.

The purchases by the Public Printer contemplated by the act of January 12, 1895, are paper and materials for printing and binding public documents and such as do not come within Revised Statutes, section 3709.

DEPARTMENT OF JUSTICE,

March 15, 1895.

SIR: I have the honor to acknowledge yours of the 14th instant, inclosing a copy of a letter dated March 11, 1895, from the Public Printer, and asking whether, in my opinion, sections 15, 16, 18, and 38 of the act approved January 12, 1895, relieve the Public Printer from a compliance with the requirements of the acts approved January 27 and April 21, 1894, amending section 3709, Revised Statutes of the United States.

Section 3709 of the Revised Statutes declares that all purchases and contracts for supplies in any of the Departments of the Government shall be made by advertising a sufficient time previously for proposals respecting the same when the public exigencies do not require the immediate delivery of the articles.

By the act approved January 27, 1894 (p. 32, Stat. 1893-94), the section just referred to was so amended that

Supplies for Public Printer.

advertisements for proposals must be made on the same days by the Executive Departments, including the Government Printing Office. But this act excepts from its operation "paper and materials for the use of the Government Printing Office, and materials used in the work of the Bureau of Engraving and Printing, which shall continue to be advertised for and purchased as now provided by law." This act reaches all supplies of the Government Printing Office except "paper and materials for the use" of that office.

By section 2 of the act approved April 21, 1894 (p. 62, Stat. 1893-94), the operation of the act of January 27, 1894, was limited to advertisements for proposals for fuel, ice, stationery, and other miscellaneous supplies, to be purchased at Washington for the use of the Executive Departments and other Government establishments. The result is, therefore, that these acts, taken together, have no effect whatever upon the Government Printing Office, except in respect of proposals for fuel, ice, stationery, and other miscellaneous supplies to be purchased at Washington, and do not change, but expressly recognize as in force, the law previously existing in regard to advertisements for paper and materials for the use of that office.

Section 15 of the act of January 12, 1895, is, with the exception of substituting "\$1,200" for "\$250," and "Public Printer" for "Congressional Printers," and leaving out the words "on public printing" after the words "joint committee," a literal copy of section 3780 of the Revised Statutes.

Section 16 of said act is, with like changes, not affecting the question under consideration, a copy of the provisions of an act approved July 31, 1876. (See 19 Stat., 105.)

Section 18 of said act is, with like changes, a literal copy of section 3760 of the Revised Statutes.

These provisions existed and operated independently of section 3709, and the acts above cited, amendatory of this section, recognize independent regulations affecting the "paper and materials for the use of the Government Printing Office" as in existence.

My conclusion, therefore, is that section 3709 did not apply to paper and materials for the Government Printing Office, and that the acts amendatory thereof enlarged it in respect

Contract—Remission of Penalty.

to this office only so as to apply to fuel, ice, stationery, and miscellaneous supplies.

As the act of January 12, 1895, only provides for printing and binding public documents, the purchases by the Public Printer therein contemplated are paper and materials for that purpose and such as do not come within section 3709 as amended. If section 3709 and the acts amendatory thereof applied in terms to such purchases for the Government Printing Office, they would, in respect of the supplies and materials specified in the act of January 12, 1895, be repealed by that act, since it provides for such purchases in special ways wholly repugnant to the method provided in the act approved January 27, 1894.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

CONTRACT—REMISSION OF PENALTY.

The provision in contract with Jeremiah J. Kennedy, providing for a forfeiture of \$20 for each day's delay in completing the work, is to be regarded as a penalty; and it is lawful to assess against the contractor only the actual damages sustained.

DEPARTMENT OF JUSTICE,

March 16, 1895.

SIR: I have yours of the 26th ultimo, referring to a contract for remodeling and enlarging the gas plant at the Military Academy, West Point, N. Y., entered into February 22, 1893, with Jeremiah J. Kennedy, and containing a provision that the work shall be completed within a certain time, and that "for each day, excluding Sundays, required after expiration of that time to complete this contract, the contractor shall forfeit to the United States twenty (20) dollars per day, to be deducted from the final payment to be made him."

There was a delay of one hundred and fifteen days in the completion of the work, and you inquire whether it is competent for the Secretary of War to retain the actual damages arising from such delay, to wit, \$225, or whether he

Civil Service—Removals.

must enforce the penalty according to the strict letter of the contract.

The inquiry can be answered only by determining whether the \$20 a day forfeiture provided for by the contract is to be regarded as in the nature of liquidated damages, or as a penalty. The latter must, I think on the whole, be deemed to be its true character, though the circumstances from which a conclusion can be arrived at are, it must be admitted, few and indecisive.

I am therefore of the opinion that it is competent for you to settle with the contractor by retaining from the final payment a sum representing the actual damages sustained.

I return the contract, and remain

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF WAR.

CIVIL SERVICE—REMOVALS.

Certain removals of superintendents and clerks in the Baltimore post-office held to have been properly made, and the appointment of their successors to have been legal. (19 Opin., 411, cited.)

DEPARTMENT OF JUSTICE,

March 18, 1895.

SIR: Your communication of February 4 asks my opinion whether certain removals of superintendents and clerks in the Baltimore post-office were properly made, and whether the appointment of their successors was legal. The facts submitted relevant to this inquiry are as follows:

Prior to November 1, 1894, the postmaster at Baltimore notified certain persons that he had appointed them respectively to the positions of superintendents of divisions and clerks to the post-office, and notified the incumbents of their removal.

On November 1 he entered the removals and appointments in a private memorandum book kept by him in the post-office for that purpose. All the persons then incumbents remained in office until November 7, and on that day the new appointees qualified by taking the oath of office. On

Civil Service - Removals.

November 2 the President's order covering these places into the civil service took effect. On November 7 the Post-Office Department received official notification from the postmaster of the removals and appointments as above stated, which notification was dated November 1, but was not received until November 7.

The Post-Office Department declined to approve the appointments. Thereupon the postmaster appointed seven of the original eight appointees as watchmen, intending, as he stated, "to apply for their classification, and then to promote to the positions which I [he] had originally appointed them by direct appointment on November 1."

The notification to the Post-Office Department of their appointment as watchmen was dated November 8, and on November 9 the Acting First Assistant Postmaster-General notified the postmaster that the changes were approved if made in accordance with the civil-service rules. On November 14 the postmaster notified the Post-Office Department of the promotion of the eight persons above referred to from watchmen to superintendents of divisions and clerks, and on the same day the Post-Office Department approved the changes in the roster if in accordance with the civil-service rules. Thereafter the postmaster withdrew the appointments of watchmen and promotions, as above stated, and in a letter to the Post-Office Department of November 24 indicated his purpose of standing upon his prior action.

The new appointees received compensation and performed duties as clerks and never performed the duties of watchmen. The removals and appointments in question were up to November 2, 1894, regulated by section 419 of the Postal Laws and Regulations. In this section it is provided as follows:

"The number, grades, and compensation of clerks for post-offices, where allowance for clerk hire is made, are fixed by the Postmaster-General. They are employed and are under the direct supervision of the postmaster (except as provided in section 452), who is held responsible for their acts. * * * All removals and new employments must be reported to the First Assistant Postmaster-General as soon as made."

Civil Service—Removals.

The postmaster was empowered to employ the clerks in question, and no formal appointment or approval was requisite. He was also empowered to make removals without restriction.

The provision that a report of removals and employments must be at once made to the First Assistant Postmaster-General is not a condition precedent to the employment nor of the consummation of the removal. They are to be reported after they have been made. It appears that prior to November 1 the new employes were notified "that they were appointed," and that the then incumbents were notified of their removal. This completed the appointments and the removals, and they were effected before the order of the President operated upon these positions. The fact that the new employes did not qualify or enter upon their new duties before the order of the President took effect does not impair the validity of the perfected employment.

In an opinion given on October 14, 1889 (19 Opin., 411), Mr. Attorney-General Miller held that a railway postal clerk, duly appointed before the civil-service rules for the Railway Mail Service went into effect, who did not take the oath of office and enter upon its duties until after such rules went into effect, was entitled to the office unaffected by such rules. The fact that the incumbents of the clerkships held over by permission of the postmaster after they had been notified that they had been removed could not give them any title to positions which had already been filled by the appointing power.

My opinion is that the removals and appointments were legal.

Very respectfully,

RICHARD OLNEY.

The POSTMASTER-GENERAL.

Registry of Wrecked Foreign-Built Vessel.

REGISTRY OF WRECKED FOREIGN-BUILT VESSEL.

A British steamship was wrecked outside the limits of the United States, was finally towed to New York, and sank in or near Erie Basin. The wreck was purchased by an American citizen at three times the cost of the wreck. *Held*, that the vessel was "wrecked in the United States," within the meaning of the Revised Statutes, section 4136; that the word "cost" in said section is to be construed literally, and that if the actual cost of the repairs is three times the actual purchase price of the wreck, it is entitled to registry.

DEPARTMENT OF JUSTICE,

March 21, 1895.

SIR: Your communication of March 14 informs me that the British steamship *Southery*, which went ashore in the Gulf of Mexico, outside the limits of the United States, and was there abandoned by her crew and turned over to the underwriters, was subsequently towed to Key West, where she received further injuries, and finally towed to New York, where she sank in or near the Erie Basin. I assume from your letter that her disasters at Key West and New York were suffered *bona fide* and were not created for the purpose of obtaining American registry. (*The Mohawk*, 3 Wall., 566.)

You further inform me that the vessel "was repaired and purchased by an American citizen at three times the cost of the wreck, * * * but evidence is submitted that the cost was below the value of the vessel." An application has been made for American registry under section 4136 of the Revised Statutes, which is as follows:

"The Secretary of the Treasury may issue a register or enrollment for any vessel built in a foreign country, whenever such vessel shall be wrecked in the United States, and shall be purchased and repaired by a citizen of the United States, if it shall be proved to the satisfaction of the Secretary that the repairs put upon such vessel are equal to three-fourths of the cost of the vessel when so repaired."

You ask me whether the vessel was "wrecked in the United States" within the meaning of that section, and also whether the word "cost" therein is to be interpreted literally, or as equivalent to "value."

The section under consideration has been very liberally construed by my predecessors. (9 Opin., 424; 15 Opin., 402;

General Appraisers—Reconsideration of Decision.

20 Opin., 253.) Construing it liberally, I am of the opinion that this vessel was "wrecked in the United States," whether or not it was in the eye of the law a wreck when first beached in the Gulf of Mexico, as to which I am not supplied with sufficient information to judge.

Answering your further question, I am clearly of the opinion that the word "cost" in said section is to be construed literally. If the actual cost of the repairs is three times the actual purchase price of the wreck, then in my opinion it is entitled to registry. Whether the present case comes under the law as so interpreted is not clear from your letter.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

GENERAL APPRAISERS—RECONSIDERATION OF DECISION.

A protest under the customs administrative act of 1890 was overruled by a Board of General Appraisers on September 26, 1892. On July 6, 1894, the attention of the Board was called to the fact that it had inadvertently overlooked some of the grounds of the protest, and a review of its decision was requested. *Held*, that it was the duty of the importer to watch for the decision of the Board, and that, after the lapse of time stated, the Board was without further jurisdiction in the premises.

DEPARTMENT OF JUSTICE,

March 22, 1895.

SIR: Your communication of March 5 informs me that a protest under the customs administrative act of 1890, filed by one L. Engelhorn, an importer, was overruled by the Board of General Appraisers on September 26, 1892. This decision was made in part inadvertently, the Board overlooking some of the grounds of the protest. On July 6, 1894, Mr. Engelhorn first called their attention to this. The Board thereupon requested the collector to return the invoice and entry in the case, in order that consideration might be given to the objections theretofore overlooked. The question thus arises whether the Board have the right, after such lapse of time, to reconsider a decision. The Board is divided in opinion on this question, and you ask my official opinion upon it.

 Central Pacific Railroad Company.

It is my opinion that the reasons of the Board of General Appraisers for their decision in overruling the protest can not now be looked into even by themselves. Their decision, as I understand your letter, overruled the whole protest. It was Mr. Engelhorn's duty to watch for the decision of the Board, and no notice to him was necessary. (Compare *Westray v. United States*, 18 Wall., 322.) Even a court, after such lapse of time, would have no power to grant a rehearing. (*Bronson v. Schulten*, 104 U. S., 410.) I therefore advise you that the Board have no further jurisdiction in the premises.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

CENTRAL PACIFIC RAILROAD COMPANY.

Views of counsel for the Central Pacific Railroad Company upon the principle to be applied in the accounting between that company and the United States as to subsidy bonds loaned to the company, which became due January 16, 1895, stated, considered, and not concurred in. Construing the acts of July 1, 1862, chapter 120, and of July 2, 1864, chapter 216, in the light of the Thurman Act of May 7, 1878, chapter 96, and sundry decisions of the Supreme Court: *Held*, that the one-half of the earnings of the company on Government business and its yearly payments of 5 per cent of its net profits can not be treated as having liquidated the whole or any part of the company's indebtedness on account of the principal of the subsidy bonds maturing January 16, 1895; but, on the other hand, must be regarded as paying interest debts exclusively. *Held further*, applying the familiar rule that in case of payments by a debtor to a creditor upon distinct transactions for distinct accounts, when neither party makes an appropriation at the time, the payments are applied by law to the liabilities of earliest date; that the sums applicable in any one year to the payment of the company's interest debts for that year must be applied in the order in which such debts arise, and the fact that bonds have been issued at various times is of no consequence.

DEPARTMENT OF JUSTICE,

March 25, 1895.

SIR: I have the honor to acknowledge yours of January 9 last, which incloses a letter of the counsel of the Central Pacific Railroad Company, containing his views upon the

Central Pacific Railroad Company.

principle to be applied in the accounting between that company and the United States, made necessary by the loan to the company of subsidy bonds of the United States, of which bonds to the amount of \$2,362,000 became due January 16, 1895.

The rule laid down by the learned counsel is that credits for transportation and for the 5 per cent of net profits referred to in the act of 1862 are applicable, first, against the interest, and second, against the principal of the first maturing bonds, and thereafter first as against the interest, and second as against the principal of subsequently maturing bonds in the order of their maturity. You inquire "whether, in liquidating the subsidy bonds falling due January 16, 1895, it [the Department] should be governed by the principle laid down in the company's statement; or if not, what method in your [my] opinion should be followed in finally disposing of the matter?"

The United States loaned the railroad company not money, but semiannual interest-bearing bonds maturing in thirty years. As it would itself not have to pay the principal of the bonds until the end of the thirty years, it could not and did not require the company to pay the principal or any part thereof before that time. But it went further. Though it would have to pay interest on the bonds semiannually, it agreed with the company that (with an exception to be presently noted) the amounts paid by it as such interest should not become due to it from the company until the principal of the bonds themselves also became due. While this was the general plan, it was foreseen that the company would annually earn money by transportation service for the Government, and that after the completion of the road there might be annual net profits applicable to dividends. It was not deemed necessary that while the Government was actually paying out money for interest it should also actually pay into the company's treasury for its transportation all the money thereby earned. Neither was it deemed wise that in the same years the Government was disbursing moneys for interest all the company's net profits should be distributed among the stockholders. It was therefore provided, as the combined

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effect of the acts of 1862 and 1864, that one-half of the money annually earned by the company on Government business should be annually retained and applied to the payment of the company's indebtedness on account of the subsidy bonds and interest, and that 5 per cent of the net profits of any year should also be applied in the same manner.

The correctness of the foregoing statement is not, it is believed, controverted. The difficulty arises when it is sought to ascertain exactly what the statute means in prescribing an annual application to the company's indebtedness of one-half of annual earnings from Government business and of the 5 per cent fund. Is it that these annual credits and receipts shall annually appear in proper accounts, but shall actually extinguish debt only after the company's entire debt for both principal and interest of the subsidy bonds has matured? Upon that construction the statutes in question simply create a sinking fund, available to pay the whole debt when matured, but not extinguishing any portion of it while maturing. Upon that construction the controlling words "annually applied," if not practically eliminated, lose their natural meaning and operate as a simple requirement for annual statements of account. Yet the Thurman Act of 1878 shows that Congress must be credited with appreciating the difference between a sinking fund accumulating against a thereafter maturing indebtedness and moneys applicable to the actual reduction of a debt as fast as received. And, as in the Thurman Act and other like acts, if the statutes of 1862 and 1864 had merely intended to create a sinking fund they would naturally have contained a provision for its interim investment pending its application.

The construction in question is, therefore, to be rejected, and the alternative view adopted, to wit, that the annual application contemplated by the statutes in question is a real application, one in fact annually extinguishing debt. But what debt is to be thus extinguished? The debt of the company for the principal of the subsidy bonds does not arise until their maturity and the payment of such principal by the Government, and before that time is not susceptible of actual extinguishment. The Government's payments for

Central Pacific Railroad Company.

annual interest, on the other hand, create absolute debts, whether payable in future, in whole or in part, is immaterial, from the moment of each payment. It follows that when the statutes of 1862 and 1864 direct one-half of the earnings from Government business and 5 per cent of the net profits for any year to be applied in such year to the company's indebtedness growing out of the loan of the subsidy bonds, the indebtedness referred to can be no other than that arising from the Government's interest payments for the same year. In short, what they in effect enact is that, though the company's debts for interest shall in general mature only when its debt for principal matures, yet so much of such debts arising in each year as can be paid by one-half the earnings from Government business and 5 per cent of the net profits for that year shall be held to mature in that year, and shall be paid and discharged accordingly.

The views above stated of the true construction of the statutes of 1862 and 1864 derive the strongest confirmation from the provisions of the Thurman Act of 1878, which, indeed, if it were repugnant to the previous statutes, would have to be regarded as amendatory thereof. Thus, the preamble recites, as respects the Central Pacific, that the United States had paid interest to the sum of more than thirteen and one-half millions "which has not been reimbursed," and, as respects the Union Pacific, that the United States had paid over \$10,000,000 interest "over and above all reimbursements." The enacting portions of the act of 1878 mark the distinction between a sinking fund and credits and receipts at once extinguishing debt in the most emphatic manner. Thus section 7 declares that the sinking fund established by the act shall, at the maturity of the bonds, be used for the satisfaction thereof. On the other hand, section 2 explicitly provides that one-half the compensation due the two companies on Government business "shall be presently applied to the liquidation of the interest paid and to be paid by the United States on the bonds." And section 4 provides, as respects each of the companies, that there should be carried to the credit of the sinking fund one-half of the compensation accruing from services for the Government "not applied to liquidation of interests."

Central Pacific Railroad Company.

The doctrine that against current debts for interest arising in any year are to be applied current credits and receipts from the sources specified accruing the same year is also strongly supported by the language used by the Supreme Court when discussing and declaring the meaning and intent of Congress, as evinced by the statutes in question and other legislation in *pari materia*. Thus, in *Union Pacific Railroad Company v. United States* (91 U. S., 72) the court (p. 78) says:

"The Union Pacific Railroad Company, conceding the right of the Government to retain one-half of the compensation due it for transportation of the mails, military, and Indian supplies, and apply the same to reimburse the Government for interest paid by it on bonds issued to the Government to aid in the construction of its railroad and telegraph line, seeks to establish by this suit its claim to the other moiety." On pages 87 and 89 the court adds: "This Congress did not choose to do, but rested satisfied with the entire property of the company as security for the ultimate payment of the principal and interest, and in the meantime, with special provisions looking to the reimbursement of the Government for interest paid by it, and to the application of the surplus, if any remained, to discharge the principal." And, "There could, however, be no reasonable objection to the application 'of all compensation for services rendered for the Government, from the outset and of, 5 per cent of the net earnings after the completion of the road' to the payment of the bonds and interest. These exactions were accordingly made."

So, in the Sinking Fund Cases (99 U. S., 700, 719) occurs the following: "The contract of the company in respect to the subsidy bonds is to pay both principal and interest when the principal matures, unless the debt is sooner discharged by the application of one-half the compensation for transportation and other services rendered for the Government, and the five per cent of net earnings as specified in the charter. This was decided in *Union Pacific Railroad Company v. United States* (91 U. S., 72)." And again (p. 723), "On the subsidy bonds, as has been seen, no interest is payable, except out of the half of the earnings for Government

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service and the five per cent of net earnings, until the maturity of the principal." (See also *Union Pacific Railroad Company v. United States*, 99 U. S., 426.)

The result is that I am unable to concur in the opinion of the counsel of the Central Pacific above stated. The one-half of the yearly earnings of the company on Government business and its yearly payments of 5 per cent of its net profits can not be treated, in my judgment, as having liquidated the whole or any part of the company's indebtedness on account of the principal of the subsidy bonds maturing January 16, 1895. They must be regarded, on the other hand, as paying interest debts exclusively; and the only remaining question is exactly what interest debts have been thus paid. It being borne in mind that every year is to stand by itself—that there is to be in each year an accounting and settlement by which the interest debts for that year are to be paid off by the designated means—the answer to the question would not seem to be difficult. It is a familiar rule that in case of payments by a debtor to a creditor upon distinct transactions and for distinct accounts, when neither party makes an appropriation at the time, the payments are applied by law to the liabilities of earliest date. Hence the sums applicable in any year to the payments of the company's interest debts for that year must be applied in the order in which such debts arise; must be applied, for example, to the interest debts arising in January in preference and priority to those arising in July of the same year. The fact that bonds have been issued at various times is of no consequence. Neither is it important to determine on what issues of bonds the interest disbursements of the Government for any year are made. The indebtedness of the company arises at the moment of each disbursement, is of the same nature, whatever be the bond issue on account of which it is made, and is each year subject to the same liquidation by the application thereto of one-half the earnings on Government transportation plus 5 per cent of the net profits for the same year. If in any year the fund applicable to such liquidation is insufficient to pay all the indebtedness arising from interest disbursements in that year, it is to be applied so as to first

Disposal of Useless Papers.

cancel the January interest indebtedness accruing in that year, and upon all interest indebtedness accruing at the same time in any year is to be applied pro rata.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

DISPOSAL OF USELESS PAPERS.

The disposition of useless papers which have accumulated in the office of the Auditor of the Treasury for the Post-Office Department is governed by the act approved February 16, 1889, chapter 171 (25 Stat., 672).

DEPARTMENT OF JUSTICE,

March 28, 1895.

SIR: I have the honor to acknowledge yours of the 26th instant, stating that there is a large accumulation of papers in the office of the Auditor for the Post-Office Department which can and should be disposed of under an act of Congress approved August 5, 1882 (First Supp. Rev. Stat., p. 373), unless said act has been repealed by the act of February 16, 1889, entitled "An act to authorize and provide for the disposition of useless papers in the Executive Departments."

Your communication incloses an opinion upon the question by the Solicitor of the Treasury, dated the 26th instant, and I do not deem it necessary for me to do more than to say that I concur in the conclusion reached by the Solicitor.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

NOTE.—The conclusion of the opinion of the Secretary of the Treasury was that a special act of Congress of August 5, 1882 (22 Stat., 219), by which the Secretary of the Treasury was authorized to sell or otherwise dispose of useless papers which might accumulate in the office of the Auditor of the Treasury for the Post-Office Department, was impliedly repealed by the general and comprehensive statute of February 16, 1889, which provided for the disposition of useless papers in the Executive Departments, for the reason that

Customs Duties—Reliquidation of Assessment.

there was an insuperable repugnancy between the two statutes. He said: "In order that they both might stand and operate together, we should have the somewhat anomalous and inconsistent practice of disposing of files of useless papers in one bureau of the Treasury Department under a special act and the disposition of such files and papers in all the other bureaus of the same Department under the general law providing an entirely different method."—W. H. P.

CUSTOMS DUTIES—RELIQUIDATION OF ASSESSMENT.

On an importation of mohair goods, made after August 28, 1894, the importer appealed from the classification of the appraiser, and, pending action by the Board of General Appraisers, upon notice by the appraiser that a mistake of fact had been made, the collector requested a return of the papers for reconsideration, but the Board declined to comply. *Held*, that section 1 of the act of March 3, 1875, chapter 136, is still in force and that the Secretary of the Treasury has the power to order a reliquidation of the assessment of duties in the interest of the importers and to direct the return of the papers to the collector.

DEPARTMENT OF JUSTICE,

March 30, 1895.

SIR: I have the honor to acknowledge your communication of March 6 and of certain correspondence relating to an importation of mohair goods by Messrs. S. Babbit & Co. at the port of New York. It appears that the goods were imported after August 28, 1894, and were returned by the appraiser as composed of wool or worsted derived from the sheep; that duty was assessed thereon by the collector accordingly; that the importers protested, or, more accurately speaking, gave notice in writing, as required by section 14 of the customs administrative act of June 10, 1890, as a result of which the papers were transmitted to the Board of General Appraisers; that subsequently the appraiser informed the collector that he had made a mistake of fact, and that the goods were in fact composed of mohair derived from the goat, and hence were liable to lesser duty under the opinion of this Department of October 9, 1894; that the collector thereupon requested a return of the papers

Customs Duties—Reliquidation of Assessment.

for reconsideration, the protest being at that time pending before the Board and undecided, but that the Board have declined to comply with this request.

I understand from your communication that you have authorized the collector to make a reexamination and reliquidation in this case. You ask my opinion whether the Board of General Appraisers is justified under the provisions of the customs administrative act in further withholding the protest from the collector.

In my opinion, section 1 of the act of March 3, 1875, chapter 136, is still in force. That act expressly provides that whenever the Secretary of the Treasury shall be of opinion that duties "have been assessed and collected under an erroneous view of the facts in the case he may authorize a reexamination and reliquidation in such case" when protest and appeal have been made, as required by law, and recognizes the right to correct "errors in liquidation, whether for or against the Government, arising solely upon errors of fact discovered within one year from the date of payment."

The error in this case being one of fact, I am therefore of opinion that you have the power to direct a reliquidation in the interest of the importers and that it is not necessary to make the importers go through the form of a hearing before the Board of General Appraisers. As the collector acted under a mistake of fact, and there is no further controversy between him and the importers, there is no reason for any further proceedings before the Board. Their functions are *quasi* judicial, and for a court to proceed with a case when the parties are agreed and desire a discontinuance would be an absurdity.

I am of the opinion, therefore, that you, as the head of the Department, have the right to direct the return of the papers to the collector.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

Examination of Official Bonds—Disbursement of "General Armstrong" Fund.

EXAMINATION OF OFFICIAL BONDS.

Attorneys for the United States are not required or authorized to make the examination into the sufficiency of sureties upon official bonds provided for in section 5 of the appropriation act for the next fiscal year.

DEPARTMENT OF JUSTICE,

March 30, 1895.

SIR: I have the honor to acknowledge yours of the 28th instant, referring to that provision of section 5 of the legislative, executive, and judicial appropriation act for the next fiscal year, which provides that "every officer required by law to take and approve official bonds shall cause the same to be examined at least once every two years for the purpose of ascertaining the sufficiency of the sureties thereon," and asking an expression of my views upon "the question of having the necessary examination into the character and value of the property of the sureties on the official bonds approved by this Department made by the U. S. attorneys for the respective districts in which the various bondsmen reside."

I am not advised of any statute which either requires or authorizes a U. S. attorney to make an examination of the character suggested, and am of the opinion that he can not be called upon to render any such service to any officer of the Navy Department charged with the duty of approving official bonds.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

DISBURSEMENT OF "GENERAL ARMSTRONG" FUND.

Directions given as to proper method of stating account with owners, etc., of the U. S. brig of war *General Armstrong*, under the acts of May 1, 1882, chapter 115, and March 2, 1895, chapter 187. *Held*, also, that the Secretary of State can not apply any part of the unexpended balance to the payment of the claim of Samuel C. Reid, jr., for "expenses and charges" incurred in the recovery of the amount appropriated.

Disbursement of "General Armstrong" Fund.

DEPARTMENT OF JUSTICE,

April 9, 1895.

SIR: I have your communication of the 3d instant, with eighteen inclosures, asking me to advise you as to what amount, if any, you are authorized to pay to Mr. Samuel C. Reid from the unexpended balance of the appropriation made by the act of May 1, 1882, for the relief of the captain, owners, officers, and crew of the U. S. brig of war *General Armstrong*, under the act of March 2, 1895, entitled "An act making appropriations for the fiscal year ending June 30, 1895, and for prior years, and for other purposes."

Under the act of 20th of April, 1882, the Secretary of State is authorized and directed to examine and adjust the claims of the captain, owners, officers, and crew upon the evidence established before the Court of Claims "and to settle the same on principles of justice and equity."

Under this authority the Secretary of State, Mr. Frelinghuysen, ascertained that the amount originally appropriated for the payment of these claims was \$70,739.

That by an instrument of writing dated the 12th of September, 1835, the owners of the vessel, comprising fifteen persons and firms, made an assignment in the words and figures following:

"In consideration of one dollar, to each of us paid, and in further consideration of the undertaking of Samuel C. Reid, of New York, *to bear all the expenses and charges* and to perform all necessary services for the collection of the demands hereafter mentioned, we, the subscribers, do assign, transfer, and set over unto the said Samuel C. Reid, his heirs and assigns forever, all our right, title, and interest in the late private-armed brig the *General Armstrong*, captured and destroyed at Fayal during the late war with England, *subject to the payment to each of us of the one-half of any monies that he may recover for or on account of said vessel.*" * * *

That \$43,000 was the amount awarded by the Court of Claims as indemnity for the losses of the owners of the vessel.

That the said Capt. Samuel C. Reid, by an instrument executed by him dated the 31st of October, 1851, assigned to

Disbursement of "General Armstrong" Fund.

Samuel C. Reid, jr., * * * "all my right, title, and interest to and in the undivided half of sixteen shares of stock in the late private-armed brig *General Armstrong*."

That by a further instrument in writing dated the 12th of December, 1856, the said Capt. Samuel C. Reid, assigned to Samuel C. Reid, jr.—

"All my right, title, and interest whatsoever to and in the late private-armed brig of war *General Armstrong*, captured and destroyed in the port of Fayal by a British squadron on the 27th day of September, 1814, as assigned to me by the stockholders and owners of said brig, in addition to the shares of stock in said brig made over by me unto the said Samuel C. Reid, junior, by deed dated 31st October, 1851; and also all monies in virtue thereof which shall or may be recovered from the Government of the United States, or the payment of which may be provided for by the Congress of the United States, in virtue of the claim of the said brig *General Armstrong* now pending before the United States Court of Claims."

That the award made for the losses of the officers and crew was \$27,739.

That the award made as indemnity for the losses of the owners of the vessel was \$43,000.

Upon these facts the Secretary of State ascertained and determined that Samuel C. Reid, jr., was entitled to recover 50 per cent of the amount awarded the owners of the vessel, being \$21,500, and to 40 per cent of the amount awarded to officers and crew as compensation for his services, being \$11,095.60, making the total amount to which Samuel C. Reid, jr., was entitled \$32,595.60.

It will be observed that in ascertaining the amount due to the claimant for his services to be 40 per cent of the amount awarded to the officers and crew the Secretary of State appears to have overlooked the fact that of those officers Capt. Samuel C. Reid had himself been allowed by the Court of Claims the sum of \$1,037, which entered into and formed part of the total award of \$27,739.

It could not have been intended that he should be allowed 40 per cent of the \$1,037, ascertained to be due him, nor could it have been intended that he should be deprived of

Disbursement of "General Armstrong" Fund.

this amount which the Court of Claims had ascertained was due him.

I think a proper statement of this branch of the account should be—

Forty per cent of (\$27,739 — \$1,037) \$26,702.....	* \$11,080.80
To which add Captain Reid's share.....	1,037.00
	<hr/>
	* 12,117.80

The statement of the entire account would then be—

Fifty per cent of \$43,000.....	\$21,500.00
Forty per cent of \$26,702.....	* 11,080.80
Captain Reid's share.....	1,039.00
	<hr/>
	* 33,619.80

Which amount Samuel C. Reid, jr., the present claimant, was entitled to receive from the appropriation of \$70,739.

It appears that Samuel C. Reid, jr., the present claimant, has made assignments to various persons, and that payments have been made to these assignees in the amounts appearing in the tabulated statement in Senate Executive Document No. 164 of the first session of the Forty-ninth Congress.

It further appears that payments have also been made to Samuel C. Reid, jr., the claimant, himself.

The sum of the payments made to Samuel C. Reid, jr., and to his assignees, being deducted from the \$33,619.80, would leave the balance which he is entitled to receive out of the unexpended balance which the act of March 2, 1895, directs shall be applied for the liquidation and settlement of the claims of Samuel C. Reid.

It appears, however, that Samuel C. Reid, jr., now insists that the unexpended balance shall be applied to reimbursing him the amounts which have been paid to his assignees, on the ground that such amounts were so expended by him in the expenses necessarily incurred in securing the appropriation.

* In stating the account with reference to the amount awarded to the officers and crew, 40 per cent of \$26,702 was carried out as \$11,080.80 instead of \$10,630.80, thus making the footing \$12,117.80 instead of \$11,719.80. The footing of the "entire account" should, consequently, be read \$33,219.80, instead of \$33,619.80. The attention of the State Department was called to the errors indicated.—W. H. P.

Disbursement of "General Armstrong" Fund.

But the objection to this is obvious and twofold.

First. The assignment of 12th of September, 1835, from the owners of the vessel to Capt. Samuel C. Reid, is subject to the express condition that he shall "bear all the expenses and charges and perform all necessary services for the collection of the demands hereafter mentioned."

Second. That the act of Congress approved March 2, 1895, under which alone the Secretary of State has authority to disburse the unexpended balance, expressly provides that it "shall be applied for the liquidation and settlement of the claims of Samuel C. Reid, according to the vouchers now on file in said Department.

And further, the claims of all the officers and crew of the brig, as well as those of the owners, have been recognized by the Court of Claims and by Congress. And should the Secretary of State now, without further authority than that conferred upon him by the act of March 2, 1895, apply any part of this unexpended balance to the payment of the "expenses and charges" incurred in the recovery of the amount appropriated, the Government would still remain liable to the officers and crew and the owners of the brig, whose recognized claims have not yet been paid out of the amount appropriated.

I am therefore of opinion that you have not the authority to apply any part of the unexpended balance to the payment of such "expenses and charges," or to the reimbursement of Mr. Samuel C. Reid, jr., or anyone else who may have paid them, but that the account should be stated as above indicated, and any balance left remaining should be reserved for the yet unascertained claimants, or for further disposition by Congress. (Opinions on other features of this case will be found 17 Opin. Att'y-Gen., 590, 600; 20 Opin. Att'y-Gen., 373.)

The inclosures are herewith returned.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

The SECRETARY OF STATE.
Approved:

RICHARD OLNEY.

Customs Duties—Drawbacks—Copyright Act.

CUSTOMS DUTIES—DRAWBACKS.

Camel's-hair noils, resulting from the separation of imported camel's hair into hair and noils, were not entitled to drawback under section 25 of the tariff act of October 1, 1890, as a manufactured article.

DEPARTMENT OF JUSTICE,
April 17, 1895.

SIR: Answering your communication of April 6, I have the honor to advise you that, in my opinion, camel's-hair noils, resulting from the separation of imported camel's hair into hair and noils, were not entitled to drawback under section 25 of the tariff act of October 1, 1890, as a manufactured article. My opinion of December 27, relating to oil cake, to which you refer, was based upon special considerations not applicable to any other by-product.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

COPYRIGHT ACT.

Section 3 of the copyright act of March 3, 1891 (26 Stat., 1106), prohibiting the importation into the United States of foreign editions of any book copyrighted in this country, is applicable to books copyrighted prior to the passage of the act; and the exceptions in the case of persons purchasing for use and not for sale, who import, subject to the duty thereon, not more than two copies of such book at any one time, is not limited in its application to the "authorized editions" of such book.

DEPARTMENT OF JUSTICE,
April 19, 1895.

SIR: I have your letter of the 15th instant, inclosing a letter from Messrs. Harper & Bros., of February 15, 1895, with a copy of your reply thereto, dated February 28, 1895, and a further letter from said firm, dated March 2, 1895, and the opinion of the Solicitor of the Treasury as to the application of section 7 of the copyright act of March 3, 1891, to books copyrighted before said act went into effect.

You ask my opinion "as to whether section 3 of said act is applicable to books copyrighted prior to the passage of

Copyright Act.

said act; and if so, whether the exception therein of two copies of copyrighted books is limited to what are known as 'authorized editions,' as claimed by Messrs. Harper & Bros."

The act of March 3, 1891 (26 Stat., 1106), is entitled "An act to amend title 60, chapter 3, of the Revised Statutes of the United States, relating to copyrights."

It will be observed as to this act that, although entitled "An act to amend title 60, chapter 3," yet, in fact, it amends only certain specific enumerated sections of that chapter.

It will be observed further that it does not repeal the then existing statutes on the subject, but that the amendments consist solely in the addition of new provisions.

The rule of construction, as stated in Sutherland on Statutory Construction, section 133, is as follows:

"The portions of the amended sections, which are merely copied without changes, are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts, or the changed portions, are not to be taken to have been the law at any time prior to the passage of the amended act. The change takes effect, prospectively, according to the general rule."

And in Endlich on the Interpretation of Statutes, section 195:

"An amendment of a statute may or may not operate as an implied repeal of the original law. If it does not change the same, but merely adds something to it, it is not, in general, a repeal thereof."

The act of March 3, 1891, was intended, as is well known, to protect domestic authors against foreign infringements of their copyrights. And, as appears by section 13 of that act, it invited reciprocity in this matter from foreign Governments.

Section 2 is an amendment of section 4956, Revised Statutes. It does not operate to repeal any provision of section 4956, but amends it only "by adding something new." It provides for the deposit in the mail or the delivery at the office of the Librarian of Congress of a printed copy of the title of the work produced, and also two copies of such work; with the proviso, however, that "during the existence of such copyright the importation into the United States of

Copyright Act.

any book * * * copyrighted, or any edition or editions thereof, * * * shall be and is hereby prohibited."

Does this apply only to such books as shall have been copyrighted since March 3, 1891? I think not. It secures to the owner of the copyright of every book which shall have been copyrighted in accordance with the requirements of this statute, whether before or after its passage, protection against the sale in this country of foreign publications of his book by prohibiting the importation of such foreign publications. The act is prospective only as to this new security which it affords to the owner of the copyright, and is not prospective as to the books to which that security applies.

He can not claim indemnity for losses sustained by reason of such importation and sale prior to the passage of the act; but while his copyright continues, whether it was acquired before or since March 3, 1891, the benefit of the act extends to him.

Neither the letter, the spirit, nor the reason of the act confines the application of the protection it affords to those books that have been copyrighted since its passage.

Tariff laws are prospective. But an amended statute which places on the free list certain articles theretofore subject to duty is not limited in its application to those articles of that class which have been produced or manufactured since the passage of the amendatory act.

To this proviso there is an exception, as follows:

"And except in the case of persons purchasing for use and not for sale, who import, subject to the duty thereon, not more than two copies of such work at any one time."

Does this refer to two copies of an "authorized edition" of such book?

The statute certainly does not say so, and the proviso to which this exception is made provides that "during the existence of such copyright the importation into the United States of *any* book so copyrighted is hereby prohibited."

I am unable to see on what ground it can be claimed that the exception refers to those books only the foreign publication of which has been authorized by the owner of the copyright.

Purchase of Seeds.

I am therefore of opinion—

1. That section 3 of the act of March 3, 1891, applies as well to books which have been copyrighted before as to those which have been copyrighted since the passage of the act.

2. That the exceptions in the case of persons purchasing for use and not for sale, who import, subject to the duty thereon, not more than two copies of such book at any one time, is not limited in its application to the “authorized editions” of such book.

I herewith return the inclosures accompanying your letter.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

RICHARD OLNEY.

PURCHASE OF SEEDS.

The seeds purchasable out of the appropriation made in the act approved March 2, 1895, chapter 169, for the purchase, propagation and distribution, as required by law, of valuable seeds, bulbs, trees, shrubs, vines, cuttings, etc., are limited to those described in section 527 of the Revised Statutes, and must be such as are adapted to general cultivation and to promote the general interests of horticulture and agriculture throughout the United States.

It is competent for the Secretary of Agriculture to make the purchases of seeds referred to conformably to section 3709 of the Revised Statutes, the right to reject any and all bids being reserved.

DEPARTMENT OF JUSTICE,
April 20, 1895.

SIR: I have the honor to acknowledge yours of the 18th instant, in which you call my attention to a portion of the act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1896, and approved March 2, 1895, and running as follows: “Division of seeds: Purchase and distribution of valuable seeds, and for the printing, publication, and distribution of Farmers’ Bulletins: For the purchase, propagation, and distribution, *as required*

Purchase of Seeds.

by law, of valuable seeds, bulbs, trees, shrubs, vines, cuttings, * * * one hundred and eighty thousand dollars."

You make two inquiries, as follows:

"Can the Secretary of Agriculture legally purchase any other seeds than those described in section 527 of the Revised Statutes, to wit, seeds 'rare and uncommon to the country, or such as can be made more profitable by frequent change from one part of our own country to another,' under authority of the act of March 2, 1895?"

"Would it be proper and lawful for the Secretary of Agriculture, in view of the verbiage of the act of March 2, 1895, and the wording of section 527 of the Revised Statutes, to advertise for proposals to furnish the Department of Agriculture seeds, bulbs, trees, vines, cuttings, and plants 'rare and uncommon to the country, and for such as can be made more profitable by frequent changes from one part of our own country to another,' reserving the right to reject any and all bids?"

1. The seeds purchasable under the act of March 2, 1895, are limited to those described in section 527 of the Revised Statutes, there being no reasonable ground for claiming that the act of March 2, 1895, operates or was intended to operate as a repeal of the earlier statutes.

2. If not obligatory on the Secretary of Agriculture to purchase seeds, trees, etc., conformably to section 3709 of the Revised Statutes, it is certainly competent for him to make the purchases conformably to said statute, the right to reject any and all bids being reserved. But the form of the question is such that I think it proper to call attention to the fact that while seeds purchased must be such as are "rare and uncommon to the country, or such as can be made more profitable by frequent changes from one part of our own country to another," the trees, plants, shrubs, vines, and cuttings to be purchased are such "as are adapted to general cultivation and to promote the general interests of horticulture and agriculture throughout the United States."

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF AGRICULTURE.

Naval Academy—Appointment of Cadets.

NAVAL ACADEMY—APPOINTMENT OF CADETS.

The proviso to the naval appropriation act of March 2, 1895, chapter 186, permitting and authorizing every Representative or Delegate in Congress "whose district or Territory is not now represented at the Naval Academy" to make recommendation on or before March 4, 1895, of a candidate for appointment as a cadet at the Naval Academy of the United States, was intended to apply to Members of the then existing Fifty-third Congress.

To be valid, it was essential that a recommendation should be made before 12 o'clock noon of March 4, 1895; and, in consequence, three recommendations considered in the opinion are held to be ineffective to deprive the successors in office of the signers of the recommendations of the general privileges granted to them by the Revised Statutes, sections 1513 and 1514.

DEPARTMENT OF JUSTICE,

April 24, 1895.

SIR: I have the honor to acknowledge your letter of the 30th ultimo, in which you ask my opinion as to the filling of certain vacant cadetships at the Naval Academy under the following clause of the naval appropriation act of March 2, 1895:

"Provided, That every Representative or Delegate in Congress whose district or Territory is not now represented at the Naval Academy for any cause by a cadet shall be permitted and authorized to recommend a candidate for appointment as a cadet at the Naval Academy of the United States, said recommendation to be made on or before the fourth day of March, eighteen hundred and ninety-five, subject to the qualifications now prescribed by law. Nothing herein contained shall be construed to increase the number of cadets at said Naval Academy as now provided by law."

It seems that about 9 o'clock on the evening of the 4th day of March last a Member of the late House of Representatives handed to the Assistant Secretary of the Navy a paper dated March 4, 1895, 11.30 a. m., in terms appointing (but undoubtedly to be construed as recommending) his son for a cadetship, that two other Members of said House made recommendations also dated March 4, 1895; and that all three recommendations were not received at the Department until March 5. Your inquiry is, whether you are authorized to treat them as valid recommendations under the provisions of the act of 1895 above quoted.

Naval Academy - Appointment of Cadets

1. The recommendation contemplated by the statute is to be made by a "Representative or Delegate in Congress."

Further, such Representative or Delegate is to be a Member of the then existing Congress, the language being that "every Representative or Delegate in Congress whose district or Territory is not *now* represented at the Naval Academy" may recommend. "Now," as thus used, designates the time of the passage of the act; it is nonrepresentation at that time that gives the right of recommendation, and, in the absence of language expressive of a contrary intent, must be held to give the right to such persons as were Representatives or Delegates at the same time. Any other construction would be forced and unnatural.

2. If, however, there could be a doubt on that point, it is settled by the prescribed time within which a recommendation must be made. It must be made on or before March 4, 1895. But March 4, 1895, is not selected as the limit of the allotted time haphazard, nor without obvious reason. It was undoubtedly chosen because by legislative usage, beginning with the foundation of the Government, never departed from, and now having the force of law, the life of each Congress comes to an end at noon of the 4th day of March. The different parts of the statute are thus mutually explanatory. March 4 is *prima facie* the official March 4, because a Congressman is authorized to act on or before that time. On the other hand, the Congressman so authorized is *prima facie* a Representative or Delegate in the Fifty-third Congress, because otherwise there would be no reason for restricting his action to a period bounded by March 4, 1895.

3. It being assumed, therefore, that a recommending Representative or Delegate in Congress under the statute of 1895 must at the time of his recommendation be a Member of the Fifty-third Congress, the only remaining question is, Were the three recommendations under consideration made before 12 o'clock on the 4th day of March, 1895?

It is clear that the O'Neill recommendation was not so made. Though bearing date, and probably written, March 4, 11.30 a. m., nothing was done with it until 9 o'clock of the evening of that day. Until then it was in the writer's possession and control, and there is no ground upon which it

Alien Engineers and Pilots.

can be held to have been made to the Navy Department until after the expiration of the prescribed time.

The recommendations from the two other Representatives mentioned, also dated March 4, were received at the Department March 5. But I am not informed how or when they were transmitted to the Department, nor do they bear any indorsement throwing light on this question. The date of a recommendation is of slight consequence. If it be true that under some circumstances a recommendation might be regarded as made before its receipt at the Department, still no such circumstances are developed in the papers submitted to me. The result is that the writers of these letters, whose terms of office had expired before their receipt, do not show themselves to have taken the steps necessary to secure the special privileges granted to themselves by the act of 1895 and to deprive their successors in office of the general privileges granted them by the Revised Statutes, sections 1513 and 1514.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

ALIEN ENGINEERS AND PILOTS.

The act approved June 26, 1884 (amending section 4131 of the Revised Statutes), commonly known as the Dingley bill, was obviously designed to make provision for a class of persons who, though aliens, might be officers of the United States under peculiar circumstances and for brief periods; and the provisions of the act not being in conflict or inconsistent with the provisions of the act approved April 17, 1874, entitled "An act to authorize the employment of certain aliens as engineers and pilots," both statutes are to be regarded as in force.

DEPARTMENT OF JUSTICE,

May 9, 1895.

SIR: I have the honor to acknowledge yours of the 23d ultimo, asking my opinion upon the question whether the statute known as the "Dingley bill," approved June 26, 1884, amending section 4131 of the Revised Statutes,

Meat Inspection - Regulations - Attorney-General.

repealed an act entitled "An act to authorize the employment of certain aliens as engineers and pilots," approved April 17, 1874.

As the law stood prior to the act of 1884, above cited, two classes of persons were competent to receive licenses as engineers or pilots on United States vessels. Citizens of the United States were one class. Aliens on the way to citizenship by having declared their intention to become citizens and by permanent residence in the United States for six months prior to the granting of licenses constituted another class. The amendatory act of 1884 did not affect, and was not meant to affect, either of these classes. Leaving them undisturbed, it was obviously designed to make provision for a third class of persons who might be officers of United States vessels under peculiar circumstances and for brief periods.

The members of both the classes first named are regarded as in effect citizens of the United States and as being eligible as such to permanent employment as officers of United States vessels generally under Revised Statutes, section 4131, and as engineers or pilots of such vessels under the act of April 17, 1874. The members of the third class, on the other hand, are aliens, whom the law excludes from general and permanent employment on United States vessels, and permits to serve on such vessels only temporarily and in emergencies.

The provisions of the act of June 26, 1884, being thus in no way in conflict or inconsistent with the provisions of the act of April 17, 1874, both statutes must be regarded as in force, and the later did not have the effect of repealing the former statute.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

MEAT INSPECTION—REGULATIONS—ATTORNEY-GENERAL.

Whenever power is given to public officers, to be exercised for the public interest, the language used, though permissive in form, is mandatory.

Meat Inspection — Regulations — Attorney-General.

The provisions of the act of March 2, 1895, chapter 169, authorizing the Secretary of Agriculture to make such rules and regulations as he may deem necessary to prevent the transportation, etc., of condemned carcasses or parts of carcasses of cattle, sheep, and swine, which have been inspected in accordance with the provisions of the act, imposes the duty to make such rules and regulations.

A regulation requiring that inspected articles found to be diseased and unfit for human food shall be at once removed and rendered in such manner as to prevent its withdrawal as a food product, under the supervision of employes of the Department of Agriculture, is not authorized by the grant of power to make regulations to *prevent transportation*.

The Secretary of Agriculture is not required to effect the prevention of the consumption of diseased meat as human food within the State of its origin and without its having been carried out and brought back into such State; nor, if the Secretary decides that pork affected with trichinæ is unfit for human food, does the law provide for or authorize its destruction as food or grant authority to license its use under limitations or restrictions.

Following 19 Opinions, 332, 412, and 20 Opinions, 703, 729, the Attorney-General declines to express an opinion upon a question propounded, because not based upon a case which has actually arisen in the administration of the Department of Agriculture.

DEPARTMENT OF JUSTICE,

May 10, 1895.

SIR: I have your letter of May 4, 1895, inclosing a copy of "An act to provide for the inspection of live cattle, hogs, and the carcasses and products thereof, which are the subjects of interstate commerce, and for other purposes," approved March 3, 1891; also a copy of "An act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, eighteen hundred and ninety-six," approved March 2, 1895; also a copy of "Regulations for the inspection of live stock and their products," made by you February 7, 1895.

Section 7 of the Regulations provides that—

"The inspector or his assistant shall carefully inspect at time of slaughter all animals slaughtered at said establishment and make a post-mortem report of the same to the Department. Should the carcass of any animal on said post-mortem examination be found to be diseased and unfit for human food, the said carcass shall be marked with the yellow condemnation tag, and the diseased organ, or parts thereof, if removed from said carcass, shall be immediately

Meat Inspection—Regulations—Attorney-General.

attached to same. The entire carcass shall be at once removed, under the supervision of the inspector or that of some other reliable employé of the Department of Agriculture, to tanks on the premises, and deposited therein, and rendered in such manner as to prevent its withdrawal as a food product. Should the establishment have no facilities for thus destroying the said carcass it must be removed from the premises by numbered permit from the inspector to rendering works designated by him, and there destroyed under his supervision in such a manner as to make it unsalable as edible meat."

You ask whether the act of March 2, 1895, is "mandatory to such a degree" that you are "legally compelled to prevent such transportation of said carcasses, thereby necessitating such regulations and their strict enforcement."

The provision of said act upon this point is as follows:

"The Secretary of Agriculture is *hereby authorized* to make such rules and regulations as he may decide to be necessary to prevent the transportation from one State or Territory or the District of Columbia into any other State or Territory or the District of Columbia, or to any foreign country, of the condemned carcasses or parts of carcasses of cattle, sheep, and swine which have been inspected in accordance with the provisions of this act."

When power is given to public officers, whenever the public interest calls for its exercise, the language used, though permissive in form is in fact peremptory. (*Supervisors v. United States*, 4 Wall., 446.) In *Regina v. Tithe Commissioners* (14 Q. B., 459), Mr. Justice Coleridge observed:

"The words undoubtedly are only empowering, but it has been so often decided as to have become an axiom that in public statutes words only directory, permissive, or enabling may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice."

The general rule is that permissive words in a statute are peremptory when used to clothe a public officer with power to do an act which concerns the public interest.

In my opinion, the words "hereby authorized to make such rules," etc., though permissive in form, confer a power, coupled

Meat Inspection—Regulations—Attorney-General.

with a duty, to make regulations to prevent such transportation of carcasses so inspected and condemned.

You ask "where such inspection is instituted for export or interstate trade, and animals are presented for inspection and found diseased and condemned by inspector, is this Department *legally compelled to render the carcasses of such animals unfit for human food*, or does the packer or owner have the right to claim said carcasses for local trade or home consumption as a food product?"

You say, referring to section 7 of the Regulations, "In my opinion, such method is absolutely necessary *to insure the destruction of condemned carcasses.*"

The law does not provide for the destruction of condemned carcasses. It contemplates that they will not be destroyed for section 5 of the act approved March 3, 1891, which is unamended by the act approved March 2, 1895, imposes a penalty for transporting the carcasses or the food products thereof which have been declared by the inspector to be unsound or diseased.

You are only authorized to make regulations to prevent transportation. If destruction of the carcasses had been intended, it is probable that such power, being in derogation of property rights, would have been expressly given.

Rules and regulations to prevent transportation would not have been necessary after such summary process. Such power would hardly be implied, and certainly not unless it appeared that no rules or regulations short of such destruction would be adequate to carry out the purpose of the law. You state that, in your opinion, the method provided is absolutely necessary to insure the destruction of condemned carcasses but not that it is absolutely necessary to prevent their transportation.

My conclusion is that you are not "legally compelled to render the carcasses of such animals unfit for human food."

You ask, "Does the law intend to prevent the consumption of diseased meat as a human food and require this Department to effect such prevention regardless of where consumed?"

The law intends to prevent the transportation of diseased meat as a human food as a part of interstate commerce or exports to foreign countries.

Lottery—Le Petit Journal.

Your Department is not required to effect the prevention of the consumption of diseased meat as human food within the State of its origin and without its having been carried out and brought back into such State.

You ask, "If this Department decides that pork affected with trichinæ is unfit for human food, does the law compel its destruction as a food, or is it left optional with the Department to destroy it or permit its use under limitations or restrictions?"

The law does not compel its destruction as a food. I do not think any power to destroy it is conferred. You have no authority to license its use under limitations and restrictions. If it has been inspected and pronounced unsound or diseased, your duties are confined to rejecting it for transportation and preventing the same by necessary regulations.

You ask, "Does the packer or owner have the right to claim said carcasses for local trade or home consumption as a food product?" You do not state that any such case is before you in the administration of your Department.

It is respectfully submitted that, in accordance with the interpretation put upon the statute by the settled practice of this Department, it will not be proper for me to express an opinion on this question until the case shall actually arise. (19 Opin., 332, 412; 20 Opin., 703, 729.)

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF AGRICULTURE.

LOTTERY—LE PETIT JOURNAL.

An advertisement in a French publication styled *Le Petit Journal*, considered, and held to fall within the prohibited class defined in section 3894 of the Revised Statutes as amended by the act of September 19, 1890, chapter 908.

DEPARTMENT OF JUSTICE,

May 14, 1895.

SIR: I beg to acknowledge the receipt of your communication of the 3d instant, inclosing a copy of *Le Petit Journal*, published in Paris, containing advertisements concerning the premium bonds of the *Credit Foncier de France*, and of

Lottery—Le Petit Journal.

France; also a copy of a communication from the Assistant Attorney-General of the Post-Office Department, dated May 3, 1895; also a communication from the Secretary of State, under date of April 16, 1895, accompanied by a copy of a communication from him to the French ambassador, bearing the same date; also a copy of a communication from your predecessor in office to the Secretary of State, under date of April 1, 1895, accompanied by copies of certain correspondence.

You ask my opinion as to whether the advertisement published in *Le Petit Journal* falls within the prohibited class defined in section 3894 of the Revised Statutes, as amended by the act of September 19, 1890 (26 Stat., 465).

The following is a translation of the advertisement, from which it clearly appears, in my opinion, that it comes within the meaning and descriptive terms of the statute as construed by the Supreme Court in *Horner v. The United States* (147 U. S., 449), and in *McLaughlin et al. v. The National Mutual Bond and Investment Company* (64 Fed. Rep., 908):

PREMIUM SERVICE OF THE LITTLE JOURNAL.

The Little Journal holds at the disposition of its readers and delivers or sends immediately the values following:

Net prices at the wicket.

Francs.	Francs.
3 franc annuity, 3 per cent.. 103.90	Communals, 1880 505.60
15 franc, 30/0, redeemable.. 509.00	Land bonds, 1885..... 505.60
3 franc 50 annuity, 31/20/0. 108.30	Communals, 1891, freed.... 406.10
City of Paris, 1865..... 579.10	Communals, 1891, fr. p..... 361.55
City of Paris, 1869..... 432.10	Communals, 1892 507.10
City of Paris, 1871..... 422.60	Communals, 1892, fr. p..... 257.55
Quarters, 1871..... 110.30	East, new..... 480.60
City of Paris, 1875..... 589.10	Paris L. M., new fusion.... 486.10
City of Paris, 1876..... 592.10	North, 3 per cent, old..... 484.60
City of Paris, 1886..... 421.60	Orleans, 1884..... 482.60
Quarters, 1886..... 107.80	West, new..... 485.60
City, 1892, 90 fr. p..... 137.05	South, new..... 481.35
Quarters, 1892, fr. 50 p..... 36.55	Press bonds..... 14.55
City of Lyons, 1880..... 104.55	Bonds, 1887, Cred. Fonc.... 17.30
Land bonds, 1877..... 403.60	Bonds, 1888, Cred. Fonc.... 59.80
Communals, 1879 505.10	Exposition bonds..... 8.75
Land bonds, 9..... 505.10	Panama bonds, by lot..... 131.80

Land bonds, 100 francs. Interest payment, 1 October. Net price, 101 fr. 25.

 Free Delivery Service.

Next drawings.

15 March. }	{ City of Paris, 1865. Land bonds, 1887. Communals, 1892.
22d March. }	

In consideration of a postage stamp for answer we make known, each time that one requests it, whether the numbers which one indicates have come out at the drawings.

To receive the titles free by mail, add to the above net prices 1 franc for the first title and 50 centimes for each additional title.

Address the funds to the administrator appointed either in bank notes or in a registered letter, or by means of a postal order, or check upon Paris, payable to the order of The Little Journal.

Write on the envelope: Service of premiums.

NOTE.—As an exceptional thing and by special agreement with the Credit Foncier, the land bonds of 100 francs, 3 per cent, 1885, suffices, then, to send 101 francs 25 per title, interest payment October, 1894.

The inclosures with your letter are herewith returned.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

The POSTMASTER-GENERAL.

Approved:

RICHARD OLNEY.

 FREE-DELIVERY SERVICE.

An extension of the free-delivery service of the Detroit post-office, so as to permit the delivery of mail to vessels in Canadian waters, is not legally authorized.

DEPARTMENT OF JUSTICE,
May 18, 1895.

SIR: I have the honor to acknowledge yours of the 15th instant, from which, when taken in connection with yours of the 10th instant, relative to the same subject-matter, I understand the only question presented for my opinion to be whether the "free-delivery service" of the Detroit post-office can be so extended as to permit the delivery of mail to vessels in Canadian waters.

Attorney-General—Commissioner of Patents.

In my judgment, such an extension of the free-delivery service of the Detroit post-office is not legally authorized.

Respectfully, yours,

RICHARD OLNEY.

The POSTMASTER-GENERAL.

ATTORNEY-GENERAL—COMMISSIONER OF PATENTS.

It is not the duty of the Attorney-General to give an opinion on questions submitted to him, except when needed for the guidance of the head of a Department, and relating to some matter calling for action or decision on his part. (20 Opin., 609, 723, followed.)

When, for the proper discharge of the duties of his office, the Commissioner of Patents desires legal advice, resort should be had to the legal force assigned to the Department of the Interior.

The Attorney-General is not permitted to render an official opinion upon questions of fact. (20 Opin., 697, 711, 717, and 740, followed.)

DEPARTMENT OF JUSTICE,

May 20, 1895.

SIR: I am in receipt of your communication of the 17th instant, transmitting a copy of a letter to you of May 16, 1895, from the Commissioner of Patents, together with a copy of correspondence between the Commissioner of Patents and Hon. A. P. Gorman, chairman Joint Committee on Printing.

The Commissioner of Patents submits to you the following questions:

"First. May the Commissioner of Patents lawfully contract for the production of the Official Gazette, including the weekly, monthly, quarterly, and annual indexes therefor, exclusive of expired patents, as a whole, upon proper advertisement, with the lowest acceptable bidder? In another form the question is, whether the Official Gazette, including the weekly, monthly, quarterly, and annual indexes therefor, exclusive of expired patents, is, as a whole, 'printing for the Patent Office, making use of lithography or photolithography, together with the plates for the same.

"Second. May the Commissioner of Patents, upon the receipt of sealed proposals, pursuant to his public advertisement therefor, lawfully award the contract to a bidder

Attorney-General—Commissioner of Patents.

who, being the lowest available bidder, proposes to do the work by printing from type all parts of the text, including briefs and claims, and proposes to do the illustrated portion by zinc or other suitable plates made by photo-engraving; that is to say, are the words lithography and photolithography generic words, including processes of similar character, in which the transfer is not made to stone, and may such liberal construction be put upon those words for the purpose of saving as much as \$22,000 in the production of this work, or must the production of those pages be by lithography or photolithography in the most restricted meaning which may be attached to those words?

“Third. Are the communications received from Senator Gorman, copies of which are herewith transmitted, limitations and conditions of the Joint Committee on Printing, such as that committee may from time to time prescribe for the conduct of the Commissioner of Patents in contracting for and performing the work hereinbefore mentioned?

“Fourth. Is there at the present time, or at the dates of any of the letters hereinbefore referred to, a Joint Committee on Printing in existence for the purpose of prescribing limitations and conditions to the Commissioner of Patents for his guidance in contracting and performing the work hereinbefore mentioned?”

You in turn submit all of said questions to me for my opinion.

By section 8 of the act approved January 12, 1895 (Public No. 15, p. 21), it is made the duty of the Commissioner of Patents, under certain conditions, to have done the printing referred to, and hence the questions submitted arise in the administration of his office.

On June 7, 1893, upon a request from you, involving in respect of my duties a similar case, I said as follows:

“It has been held frequently that the statutes prescribing the duties of the Attorney-General (Rev. Stat., secs. 354 and 356) do not authorize or require him to give an official opinion except to the President or to the head of an Executive Department; and it would seem to follow that the opinion should be needed for the guidance of the head of a Department, and should relate to some matter calling for action or

Attorney General—Commissioner of Patents.

decision on his part. The reasonableness of this limitation upon the authority of the Departments to call upon the Attorney-General for official opinions is manifest when we remember that the Attorney-General must personally pass upon every question so submitted to him; for although he may, under Revised Statutes, section 358, refer the question to a subordinate for a written opinion, the action of the subordinate must be examined and approved by the Attorney-General to give it effect.

“For the guidance of the heads of bureaus and other officers of the Departments in the discharge of their duties, provision is made by section 361 of the Revised Statutes for assistance from the officers of the Department of Justice, under the direction of the Attorney-General; and an assistant attorney-general, and law clerks have accordingly been assigned to the Department of the Interior, to whom, it seems to me, the Commissioner of Patents should submit his question.

“The power of disbarment given by section 487 is conferred upon the Commissioner of Patents. It is only after he has made a decision that his opinion is submitted to review by the Secretary of the Interior. In determining whether he shall make a reference, and if so to whom, he acts in the first instance upon his own responsibility, and not under the supervision or direction of the Secretary of the Interior. An answer to the question submitted by the Commissioner of Patents can not, therefore, at the present stage of the proceeding, be required for the guidance of the Secretary of the Interior; and the Attorney-General, if he should make an answer, would not only overstep the boundaries which appear to be prescribed for him by a long line of decisions and by uniform practice, but would commit himself upon a question which may be properly submitted to him hereafter by the Secretary of the Interior if the action of the Commissioner of Patents shall come under his review.”

This view was adhered to in 20 Opinions, 723.

I further call to your attention that the first question asks me to determine “whether the Official Gazette, including the weekly, monthly, quarterly, and annual indexes therefor, exclusive of expired patents, is, as a whole, ‘printing for the

Seal Fisheries—Deposit of Bonds by Lessee.

Patent Office making use of lithography or photolithography, together with the plates for the same;" and that the second question asks, "are the words lithography and photolithography generic words, including processes of similar character in which the transfer is not made to stone."

I am not permitted by the statute to render an official opinion upon questions of fact. (20 Opin., 697, 711, 717, 740.)

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE INTERIOR.

SEAL FISHERIES—DEPOSIT OF BONDS BY LESSEE.

The Secretary of the Treasury can not rightfully require of the North American Commercial Company, in addition to the deposit of \$50,000 in bonds of the United States already made pursuant to section 1963 of the Revised Statutes, security to the amount of the indebtedness of the company for the years 1894 and 1895.

DEPARTMENT OF JUSTICE,

May 21, 1895.

SIR: I have yours of the 18th instant, in which the inquiry is made whether or not the Secretary of the Treasury may exact from the North American Commercial Company, as lessee of the seal islands, in addition to the deposit of \$50,000 in United States bonds already made pursuant to section 1963 of the Revised Statutes, a further deposit of such bonds, or of other security, to the amount of the indebtedness of said company, to wit, for the year 1894, \$132,187.50, and for the year 1895, \$214,298.37, and in the event of the failure to furnish such additional bonds, or other security, whether the Secretary of the Treasury may annul the contract with said company, made in 1890.

In my judgment, the Secretary of the Treasury can not rightfully require the North American Commercial Company to furnish the additional bonds or other security above referred to.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

Attorney-General—Comptroller of Treasury.

ATTORNEY-GENERAL—COMPTROLLER OF TREASURY.

The question whether or not the Secretary of the Treasury, in view of sections 192 and 3683 of the Revised Statutes, is authorized by the appropriation acts for the present fiscal year to purchase newspapers or other articles for use outside of Washington, belongs to a class of questions which, since the going into effect of section 8, chapter 174, of the legislative appropriation act of July 31, 1894, should not be asked of the Attorney-General, at least except in matters of great importance, but should be submitted to the Comptroller of the Treasury, whose opinion will form a complete protection.

DEPARTMENT OF JUSTICE,
May 22, 1895.

SIR: I have the honor to acknowledge your communication of May 17, in which you ask my official opinion whether section 192 of the Revised Statutes is limited in its application to the purchase of newspapers for the bureaus and offices at the seat of Government, or applies to all bureaus and offices under the Treasury Department, no matter where situated; and also whether section 3683 of the Revised Statutes applies to all offices and bureaus of the Treasury Department, whether situated in Washington or elsewhere, or is limited only to those located in Washington.

Questions upon which the official opinion of the Attorney-General is asked must be questions actually arising in the administration of one of the other Executive Departments. The questions actually arising in your Department are whether, in view of the sections above mentioned, you are authorized by the appropriation acts for the present fiscal year to purchase newspapers or other articles for use outside this city.

These are questions which, prior to October 1, 1894, could properly be asked of the Attorney-General. But by the legislative appropriation act of July 31, 1894 (chap. 174, sec. 8), it was provided as follows:

“The head of any Executive Department * * * may apply for, and the Comptroller of the Treasury shall render, his decision upon any question involving a payment to be made by [him] or under [him], which decision, when rendered, shall govern the Auditor and the Comptroller of

Attorney-General—Statutory Construction—Mortar Steel.

the Treasury in passing upon the account containing said disbursement."

By section 24 of the same act this provision took effect on the 1st day of October.

The questions which you now ask me could have been asked of the Comptroller of the Treasury under this provision. I think that they belong to a class of questions which, now that an opinion of the Comptroller forms a complete protection, should no longer be asked of the Attorney-General, at least except in matters of great importance. They are questions which the Comptroller, by his greater experience, is better qualified to pass upon, and it is desirable to avoid any possible conflict of precedents.

Therefore it seems to me inadvisable for me to attempt to pass upon these inquiries.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL—STATUTORY CONSTRUCTION—MORTAR STEEL.

Questions submitted to the Attorney-General for his opinion must be definitely formulated. (20 Opin., 711, 713.)

If a technical usage is not definite, uniform, and general, it is entitled to no weight in statutory construction.

Assuming that the term "mortar steel," as employed in the fortifications appropriation act of March 2, 1895 (chap. 162, sec. 2), has not a settled technical meaning, it is properly construable as including any steel of such quality as is considered by experts to be adapted for use in the construction of mortars.

The assertion on behalf of a certain firm or corporation that the term in question refers to steel of their manufacture, and that the section of the statute containing such term was introduced at the suggestion of their attorney, is not entitled to any consideration.

DEPARTMENT OF JUSTICE,

May 23, 1895.

SIR: I have the honor to acknowledge your communication of May 20, asking my opinion on certain questions presented by the Board of Ordnance and Fortifications and by

Attorney-General—Statutory Construction—Mortar Steel.

the Chief of Ordnance. It is necessary, upon such an application, to formulate definitely the questions answers to which are desired. (20 Opin., 711, 713.) The only question which I find definitely formulated relates to the definition of the term "mortar steel" in the fortifications appropriation act of March 2, 1895, section 2.

That section provides for the purchase of certain breech-loading mortars, "built of mortar steel," in case they shall be found "to be at least equal in accuracy, range, power, endurance, material, and general efficiency to the best breech-loading service mortar in use."

It appears that a certain firm or corporation, known as Cramp & Sons, claims that the term "mortar steel" is a technical one, confined to a certain quality of steel made by themselves by a secret process, not patented, and whose nature can not be ascertained from them.

To define this term it is first necessary to ascertain whether it has a settled technical meaning. If it has none, then the words must be regarded as used in the ordinary sense. (*Saltonstall v. Wiebusch*, 156 U. S., 601, 602.) Whether the term has such a technical meaning is a question of fact (*Seeberger v. Schlesinger*, 152 U. S., 581, 585); and questions of fact I am not authorized to decide. (20 Opin., 590, 592.) I think, however, that your letter sufficiently shows that whatever technical usage may exist concerning the words "mortar steel," it is not sufficient to establish such a technical definition of that term as could affect its statutory construction. You say: "The term can not be said to be one in general use." If the usage is not definite, uniform, and general, it is entitled to no weight. (*Maddock v. Magone*, 152 U. S., 368; *Berbecker v. Robertson*, 152 U. S., 373.)

So far, therefore, as the facts are stated by your letter, the term "mortar steel" is properly construable as including any steel of such quality as is considered by experts to be adapted for use in the construction of mortars.

The claim that this section "was introduced at the suggestion of the attorney for Cramp & Sons" is not entitled to any consideration. The section was introduced, whether as part of the original bill or by way of amendment thereto,

Attorney-General—Statutory Construction—Purchase of Envelopes.

by some Member of Congress; and it can not be presumed or proved that any Member of Congress acted in the performance of his duties on behalf of Cramp & Sons or any other firm or corporation.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

ATTORNEY-GENERAL—STATUTORY CONSTRUCTION—
PURCHASE OF ENVELOPES.

The provisions of section 8 of the appropriation act of July 31, 1894, chapter 174, make it obligatory upon the Comptroller of the Treasury to render a decision upon any question involving a payment to be made by or under the head of any Executive Department, and contemplate the construction by him of statutes. (Opin. May 22, 1895, reaffirmed.)

A question regarding the construction of section 96 of the act of January 12, 1895, chap. 23, which provides that "The Postmaster-General shall contract for all envelopes, stamped or otherwise, designed for sale to the public or for use by his own or other Departments," *held* to be a general question, applicable to all the Departments, and to be of sufficient importance to warrant its submission to the Attorney-General for his opinion thereon.

The conclusion that a statute is repealed by implication is only reached when there is irreconcilable conflict and when the two statutes can not by reasonable construction stand together; and, in measuring the legislative intent as to the scope to be given to a statute in its operation upon previous statutes not specifically referred to, a consideration of the effect upon the public welfare must necessarily be taken in view. (3 Opin., 438; 2 Opin., 260, cited.)

Applying the rule of construction stated in the previous paragraph and construing the provisions of section 96 of the act of January 12, 1895, in connection with sections 3709 and 3710 of the Revised Statutes, *held*, that the section of the act of 1895 referred to has no application when an exigency may require an immediate delivery of envelopes to a particular Department and the public service might be seriously impaired by the necessity of a requisition upon the Postmaster-General.

In the event of an exigency requiring an immediate delivery of envelopes the provisions of section 3709 of the Revised Statutes govern, and the head of the Department in which the exigency exists may make the purchases required by the exigency.

Attorney-General—Statutory Construction—Purchase of Envelopes.

DEPARTMENT OF JUSTICE,

May 23, 1895.

SIR: I am in receipt of your letter of May 20, 1895, asking whether or not section 96 of the act of January 12, 1895, providing for public printing, "is intended to direct the purchase by the Postmaster-General of all envelopes designed for use in the *Navy and Marine Corps*, or whether it is limited in its application to such envelopes as may be required for use by the Executive Departments at Washington."

It is provided by 28 Statutes, 208, as follows:

"All decisions by Auditors making an original construction or modifying an existing construction of statutes shall be forthwith reported to the Comptroller of the Treasury, and items in any account affected by such decisions shall be suspended and payment thereof withheld until the Comptroller of the Treasury shall approve, disapprove, or modify such decisions and certify his actions to the Auditor. All decisions made by the Comptroller of the Treasury under this act shall be forthwith transmitted to the Auditor or Auditors whose duties are affected thereby.

"Disbursing officers, or the head of any Executive Department, or other establishment not under any of the Executive Departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement."

This act makes it obligatory upon the Comptroller of the Treasury to make a decision upon any question involving a payment to be made by or under the head of any Executive Department, and it contemplates the construction by him of statutes.

It appears by the file of papers transmitted with your letter that the Comptroller, on April 1, 1895, made the following ruling:

"Exigency, section 3709, Revised Statutes, purchase of envelopes.

Attorney-General—Statutory Construction—Purchase of Envelopes.

“Section 96, act approved January 12, 1895, ‘providing for the public printing and binding and the distribution of public documents.’

“*Held*, that where, therefore, the public exigency requires the immediate delivery of the envelopes they may be procured under the provision of section 3709, Revised Statutes, by open purchase, in the manner in which such articles are usually bought and sold between individuals, but in all cases where a contract can be made for the purchase of envelopes, such contract must, under the provisions of section 96 of the printed act, be made by the Postmaster-General.”

This is broad enough to cover the question presented by you, but it is suggested that the case is exceptional, and a further ruling is asked.

In a recent opinion (May 22, 1895) I came to the conclusion that the opinion of the Attorney-General should not be rendered upon questions which, under section 8, chapter 174, Statutes 1894, could be referred to the Comptroller for decision (*except in matters of great importance*), inasmuch as a conflict of precedents might ensue.

The Comptroller himself, as appears from the file transmitted by you, says: “As the question in the form presented is a general one, applicable to all the Departments, it is respectfully suggested that it would be expedient to have the matter determined by an opinion from the Attorney-General.”

This case falls within the exception stated in my opinion May 22, 1895, and I therefore, without departing from the precedent therein established, comply with your request.

By section 3709, Revised Statutes, all purchases and contracts for supplies in any of the Departments of the Government shall be made by advertising for proposals “when the public exigencies do not require the immediate delivery.” When such delivery is required, such supplies may be procured “by open purchase or contract at the places and in the manner in which such articles are usually bought and sold between individuals.”

By section 3718 “all provisions, clothing, hemp, and other materials of *every name and nature* for the use of the Navy, and the transportation thereof, *when time will permit*, shall be furnished by contract by the lowest bidder.”

Attorney-General—Statutory Construction—Purchase of Envelopes.

Under these sections supplies of every name and nature for the Navy are to be purchased by contract upon advertisement, except in cases when the public exigency will not permit of delay, and then by open purchase as between individuals.

By 28 Statutes, 33, section 3709 was amended so as to regulate the advertisements and award of contracts. It did not affect that portion of the section applicable when the public exigency requires immediate delivery.

Section 96 of the act of January 12, 1895, is as follows:

“The Postmaster-General shall contract for all envelopes, stamped or otherwise, designed for sale to the public, or for use by his own or other Departments, and may contract for them to be plain or with such printed matter as may be prescribed by the Department making requisition therefor: *Provided*, That no envelope furnished by the Government shall contain any business address or advertisement.”

By this provision the several Executive Departments are deprived partially or entirely, according to the construction that may be given to the act, of all power to contract *for envelopes*, and this authority is transferred to the Postmaster-General. This act must be construed *in pari materia* with sections 3709 and 3718. By section 100 all laws in conflict with the provisions of this act are repealed. No part of section 3709 is expressly repealed. The conclusion that a statute is repealed by implication is only reached when there is irreconcilable conflict, and when the two statutes can not by reasonable construction stand together. In measuring the legislative intent as to the scope to be given to a statute in its operation upon previous statutes not specifically referred to, a consideration of the effect upon the public welfare must necessarily be taken in view. If holding a statute to be repealed by implication would produce an impracticable situation and a serious embarrassment in the public service, the reasonable conclusion would be that such was not within the legislative intent, where effect, without such conflict, can be given the new statute, and with such range, as, taking the subject-matter of legislation into consideration, it is fairly inferable, was contemplated. In 3 Opinions, 438, in construing a statute providing for purchases for the

Attorney-General—Statutory Construction—Purchase of Envelopes.

Navy, it was said: "These exceptions must consist of cases which plainly and manifestly were not within the view and design of Congress when the law was passed, and which can not, *without injury to the public service*, be subjected to the operation of the rule laid down."

In 2 Opinions, 260, Attorney-General Berrien, construing an act of March 3, 1809, said: "Where immediate delivery is necessary to the wants of the public service, the article required must be obtained by open purchase; that is, by purchase at the places where articles of the description wanted are usually bought and sold, and in the mode in which such purchases are ordinarily made between individual and individual." Since that time (1829) this Government has sanctioned the policy of permitting immediate purchases in cases of emergency. Almost the exact language used by Mr. Berrien was enacted into law by the act of March 2, 1861 (12 Stat., 220), carried into the Revised Statutes as section 3709.

It can not be assumed that Congress, in an act specially treating of public printing, intended, in respect of any supplies necessary for the public service in an emergency, to set aside a uniform policy extending over more than fifty years.

The Departments of Government in their operation cover a wide territory, and even in the matter of envelopes exigencies may require immediate delivery, and the public service might be seriously impaired by the necessity of a requisition upon the Postmaster-General.

My opinion is that this section does not apply in such cases, but that it was intended to apply in those cases in which contracts were to be made by advertisement, the Postmaster-General, in respect of envelopes thus procured, being charged with the duty which previously rested upon the heads of the several Departments. I entirely concur in the conclusion reached by the Comptroller of the Treasury as above set out.

In my judgment, the fact of the use being for the Navy and Marine Corps does not constitute any ground for distinction, the only exceptions being those arising out of the public exigency and shortness of time.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

Withdrawal of Bids—Attorney-General.

WITHDRAWAL OF BIDS—ATTORNEY-GENERAL.

After a bid for the construction of public works has been accepted, the bidders have not the right to withdraw their proposal merely because of a mistake on their part which was not mutual and which was due to their negligence. (20 Opin., 1, distinguished.)

The Attorney-General will not answer questions propounded by the head of a Department not presently arising. (20 Opin., 723.)

DEPARTMENT OF JUSTICE,
June 1, 1895.

SIR: I have the honor to acknowledge your communication of May 27, asking my official opinion concerning the application of Messrs. Thomas H. Stanley & Co. for leave to withdraw a bid, after formal acceptance, for the construction of certain public works at the New York Navy-Yard. It appears that this firm, concerning whose competency and responsibility no doubt is entertained, responded to an advertisement soliciting proposals, and proved to be the lowest bidders, and that their "proposal was formally accepted by the Bureau by letter dated May 16." Thereafter, and under date of May 18, the firm requested leave to withdraw its bid. The reason given is that in making its estimates two errors in calculation occurred, making a difference of over \$6,000 in the result. You inform me that there is no reason for questioning the truthfulness of these statements. You add, however, that "while not desiring to take advantage of the mistakes or carelessness of bidders, this Department feels somewhat reluctant to concede to them the privilege of withdrawing their proposals where miscalculations or other clerical errors appear, inasmuch as such decision might prove to be a precedent opening the door to fraudulent practices."

You ask me, first, whether the firm have a right to withdraw their proposal. I am clearly of the opinion that they have not such right. The mistake was not a mutual one, and it was due to negligence on their part. You refer to the opinion of my predecessor in the case of the Western Electric Company (20 Opin., 1). That opinion related to a clerical error in a bid, by which the figure 4 was substituted for the figure 9, so that it read "\$4,350" instead of "\$9,350."

Civil Service—Law Clerks—Construction of Statutes.

Whatever may have been the proper rule of the law applicable to that case, I think the present one is very clear.

You ask me also whether or not you are authorized, in your discretion, to permit such withdrawal. I understand from your communication that you do not intend to do so, even if you have the authority. The question, therefore, seems not to be one of those presently arising within the Department which I am directed by the statutes to answer. (20 Opin., 728.)

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

CIVIL SERVICE—LAW CLERKS—CONSTRUCTION OF STATUTES.

The provisions of the legislative, executive, and judicial appropriation act of March 2, 1895, chapter 177 (28 Stat., 776, 777), with reference to the offices of law clerk in the office of the Comptroller of the Treasury and in the offices of the Auditors of the Treasury, are to be construed in connection with the prior act of July 31, 1894, chapter 174 (28 Stat., 173 *et seq.*).

The mode of appointment of the law clerks referred to above is fixed by the act of 1894, and the provisions of that statute on the subject are not repealed by the later statute.

The offices in question are not made the subject of competitive examination by the provisions of the statute of 1895.

DEPARTMENT OF JUSTICE,

June 3, 1895.

SIR: I have the honor to acknowledge your favor of the 1st instant, inclosing a communication from the Civil Service Commission (herewith returned), in which the Commission asks for an opinion from the Attorney-General upon the question whether the legislative, executive, and judicial appropriation act of March 2, 1895, is to be construed as making the offices of the law clerks in the office of the Comptroller of the Treasury and in the offices of the Auditors of the Treasury the subjects of competitive examination.

There is no question, in my judgment, that the act of March 2 can not be given any such operation. It simply enacts that clerical services may be exacted of such law

Attorney-General—Comptroller of Treasury.

clerks, leaving the mode of their appointment as fixed by the prior act of July 31, 1894. The provisions of both statutes, though found in annual appropriation acts, are permanent enactments which are to be construed as a whole and which, so construed, present no irreconcilable inconsistencies or incongruities. There is no basis, therefore, for the contention that the later repeals the earlier statute.

Very respectfully,

RICHARD OLNEY.

The PRESIDENT.

ATTORNEY-GENERAL—COMPTROLLER OF TREASURY.

The Attorney-General declines to advise upon a question submitted to him, for the reason that the question can now be asked of the Comptroller of the Treasury.

DEPARTMENT OF JUSTICE,

June 8, 1895.

SIR: Your communication of May 31 asks my official opinion as to your right to refund certain duties claimed to have been collected through mistake of law. This is one of those questions which can now be asked of the Comptroller of the Treasury, and for reasons set forth in recent opinions I therefore feel that I should refrain from advising thereon.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

OPINIONS
OF
HON. JUDSON HARMON, OF OHIO,
APPOINTED JUNE 10, 1895.

WEATHER BUREAU.

A vacancy in the office of Chief of the Weather Bureau can only be filled in the mode provided by section 4 of the act of October 1, 1890, chapter 1266 (26 Stat., 653).

DEPARTMENT OF JUSTICE,
June 17, 1895.

SIR: I have the honor to acknowledge the receipt of yours of the 15th instant, and to reply as follows:

By section 4 of the act of October 1, 1890 (26 Stat., 653), the Weather Bureau is made to—

“Consist of one chief of Weather Bureau,” etc., who “shall receive an annual compensation of four thousand five hundred dollars, and be appointed by the President, by and with the advice and consent of the Senate: *Provided*, That the Chief Signal Officer of the Army may, in the discretion of the President, be detailed to take charge of said Bureau,” etc.

In my opinion, the clause in the act making appropriations for the Department of Agriculture for the ensuing fiscal year, to which you call my attention, namely, “and the Secretary is hereby authorized to make such changes or assignments to duty in the personnel or detailed force of the Weather Bureau for limiting or reducing expenses as he may deem necessary,” does not affect the above provisions of the act of 1890. No intention to have such effect is expressed, so both must stand if possible. By the former act the office of Chief of the Weather Bureau was created, to be filled by appointment by the President. It is not reasonable to suppose that

Enrolled Fishing Vessels—Deposit of Ships' Papers.

the authority given the Secretary of Agriculture in the latter act was intended to apply to the Chief of the Bureau, especially as its language appears to be directed rather to the "force" alone.

My opinion, therefore, is that upon the expiration of the term of the present incumbent of the office of Chief of the Weather Bureau the vacancy can be filled only by appointment by the President, or by detailing the Chief Signal Officer of the Army under the proviso above quoted. The authority to fill the office of Chief of the Weather Bureau by detail from the Army being expressly limited to the Chief Signal Officer, no other officer can be detailed to fill that position, although other officers, not exceeding four, may be assigned to duty in the Bureau. As I understand Major Dunwoody is not the Chief Signal Officer of the Army, he can not be detailed to act as Chief of the Weather Bureau.

I return herewith your inclosure.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF AGRICULTURE.

ENROLLED FISHING VESSELS—DEPOSIT OF SHIPS' PAPERS.

The masters of fishing vessels, enrolled but not registered, are not required by sections 4309 and 4310 of the Revised Statutes to deposit their ships' papers with the United States consul when they arrive at a foreign port where there is such a consular officer.

DEPARTMENT OF JUSTICE,

July 9, 1895.

SIR: I have the honor to submit my opinion, as requested by your letter of the 25th ultimo, upon the question "whether the masters of fishing vessels, enrolled but not registered, are required by sections 4309 and 4310 of the Revised Statutes to deposit their ships' papers with the United States consul when they arrive at a foreign port where there is such a consular officer."

The distinction between registered vessels, being those engaged in foreign commerce, and enrolled and licensed vessels, being those employed in the coasting trade or in fishing, is plainly marked in our statutes and decisions and has been

Enrolled Fishing Vessels—Deposit of Ships' Papers.

well known for almost a century. It is kept up throughout the legislation of Congress on the subject and has been recognized by the courts. (*The Mohawk*, 3 Wall., 506.)

It would seem clear, therefore, that sections 4309 and 4310, which are found in Chapter XLIX, relating to "Regulation of vessels in foreign commerce," and whose terms do not include enrollment and license papers, could not be held to apply to merely enrolled and licensed vessels unless there is some other express provision or necessary implication of the statutes which so requires.

It has been suggested that the last clause of section 4312, viz, "and vessels enrolled, with the masters or owners thereof, shall be subject to the same requirements as are prescribed for registered vessels," has such effect. But it was held in the case above cited that the provisions of section 2 of the act of February 18, 1793 (1 Stat. L., 305), of which section 4312 is merely the revised form, applied only to matters connected with the act of enrollment and the proceedings therefor; and while the original act has been somewhat changed and abbreviated in the revision—notably by the omission of the phrase "in those respects," thereby suggesting a broader meaning of the last clause of section 4312, above quoted—yet it is well settled that changes in meaning are not to be lightly inferred from mere alterations in expression made in revision. And where there is doubt as to the construction of a revised statute reference may always be had to the original act. (*Myer v. Car Co.*, 102 U. S., 11.)

It is evident that no such change in the effect of section 4312 was intended, from the fact that the original distinction between registered and enrolled vessels is carefully preserved in the Revised Statutes, and that section 8 of the act of February 18, 1793, was kept in force as section 4337, which provides for the seizure and forfeiture of any enrolled or licensed vessel which shall proceed on a foreign voyage without first giving up her enrollment and license and being duly registered.

Section 4309 is section 2 of the act of February 28, 1803, which relates to vessels engaged in foreign commerce only, and was supplementary to the act of April 14, 1792, concern-

Enrolled Fishing Vessels—Deposit of Ships' Papers.

ing consuls, etc. Section 1 of that act provided that before a clearance should be granted to any vessel bound on a foreign voyage the master should deliver a list of his crew and give bond to produce such list and the persons named therein on his return, excepting such as should have been discharged with the consent of a consul, etc., or have otherwise properly been stricken from such list. On April 4, 1840, a law was passed to make registers lawful papers for vessels employed in whale fishery, section 2 of which act provided that "all the provisions of the first section of the act of February 28, 1803, shall apply to whaling vessels." As the language of such section 1 is no more applicable to a whaling vessel enrolled and licensed than the language of section 2 (now Rev. Stat., 4309) concerning the deposit of the register, etc., this law of 1840 shows that section 2 (now Rev. Stat., 4309), as well as the whole act of which it is a part, was not understood by Congress as applying to enrolled and licensed vessels.

There are many considerations, which I think it unnecessary to discuss, which tend to show it extremely improbable that Congress intended the provisions in question to apply to any but vessels engaged in foreign trade. Such vessels always sail to foreign ports and do all their business in such ports. One of the expressed objects of the requirements in question was to protect seamen from unlawful discharge without the payment of wages as required by law. Fishing vessels, on the contrary, are not bound for and do not visit foreign ports except accidentally or incidentally, their business being carried on entirely at sea. The fact is well known that those engaged on fishing vessels are not usually hired on wages, but are interested in the catch. Accordingly, title 51, Revised Statutes, page 850, contains regulations adapted to such cases.

Without further extending this opinion I will simply say that after careful examination of the subject I must answer your question no.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF STATE.

 Quarantined Cattle.

QUARANTINED CATTLE.

Under the provisions of chapter 839, act of August 30, 1890, the Secretary of Agriculture may adopt and enforce regulations requiring that food and attendance should be provided to quarantined cattle by the owners.

In cases where an outlay becomes necessary to prevent the loss of quarantined cattle, such outlay may lawfully be made from the appropriation "To establish and maintain quarantined stations, and to provide proper shelter for and care of neat cattle imported at such ports as may be deemed necessary," etc. (chap. 169, act of March 2, 1895); and the Secretary of Agriculture may hold such cattle until such expenses are repaid, and sell them upon failure or refusal to repay within a reasonable time.

DEPARTMENT OF JUSTICE,
July 11, 1895.

SIR: I have the honor to submit the following opinion in reply to your inquiry of June 26, whether your Department has authority to pay for the feedings, etc., of quarantined cattle; whether such expenses, if so paid, become a lien upon the animals, for which they can be sold; and if so, in what manner the sale is to be made.

The law under which you now act in the matter is that of August 30, 1890 (26 Stat., 414), by section 7 of which the Secretary of Agriculture is "authorized, at the expense of the owner, to place and retain in quarantine all neat cattle, sheep, and other ruminants, and all swine, imported into the United States, at such ports as he may designate for such purpose, and under such conditions as he may by regulation prescribe, respectively, for the several classes of animals above described."

Under the general quarantine laws (Rev. Stat., 4792-4796), cattle, as cargoes or parts of cargoes, were deposited at quarantine "at the risk of the parties concerned therein," and remained in the joint custody of the collector and "the owner or master or other person," etc.

The making of regulations was provided for in the latter law as well as in the former, and the Secretary of the Treasury, on June 8, 1883 (Synopsis of Decisions, Treasury Department, p. 282), adopted "regulations governing the treatment and quarantine of imported cattle," the fourteenth of which required that food and attendance should be provided by the owners thereof.

Quarantined Cattle.

It is fair to assume that Congress was aware of these regulations when the law of 1890 was passed, and that the phrase "at the expense of the owner," in section 7 thereof, above quoted, had reference to the existing practice. I recommend that you adopt and enforce a similar regulation. If you should undertake to advance the cost of food and attendance it can readily be seen that you might become involved in considerable outlays of money with some risk of loss, as well as of disputes with owners. Such a regulation would, except in rare instances, such as the one which occasioned your letter, prevent cattle being unloaded until provision is made for the expense of their keep.

It may, however, happen in some cases that an outlay for such cattle on the part of your Department may be required to avoid their loss. In my opinion such outlay may lawfully be made in such cases from the appropriation "To establish and maintain quarantine stations, and to provide proper shelter for and care of neat cattle imported at such ports as may be deemed necessary," etc. (Act of March 2, 1895, laws Fifty-third Congress, third session, p. 733.) While this act, like previous appropriation acts for the same purpose, uses language which, taken alone, would seem to impose upon the Government the expense of such care, it must be taken in connection with the law of 1890, which expressly provides that it shall be "at the expense of the owner." But in cases where, by reason of the death of the owner or his agent, or some event making it impossible to secure provision for such expenses in advance, cattle must be cared for or lost, you may lawfully expend the necessary amount therefor, hold the cattle until such expenses are repaid, and sell them upon failure or refusal to repay within a reasonable time.

I would suggest that, to save all question, you make a regulation providing for notice to owners in cases where, by any chance, you are compelled to advance money, and fixing a time within which such expenses must be repaid or the cattle sold. To avoid all questions about the notice the regulation should specify notice by posting, publication, or otherwise, as you may deem best.

While I can see room for dispute on the question whether the Government would have a lien for moneys so advanced

Employment of Counsel for the United States.

and a right to sell on notice to enforce it, I think that the statutes on the subject are to be liberally construed in view of their nature, and that their fair intention and effect include the right not only to retain cattle to secure repayment of expenses, but also to sell them if such expenses are not repaid. Whatever doubt there may be will, in my opinion, be removed by the making and publication of such a regulation as I have above mentioned.

I repeat, however, the suggestion that the regulations should require the payment of such charges in advance or provide for feeding and care by the owner or his agent in person in all cases where some unavoidable event does not prevent.

JUDSON HARMON.

The SECRETARY OF AGRICULTURE.

EMPLOYMENT OF COUNSEL FOR THE UNITED STATES.

In view of the provisions of Revised Statutes, section 189, the Secretary of the Navy is not authorized to employ counsel in foreign countries to institute suit in behalf of the United States to recover for damages caused to a war vessel of the United States, but the case should be referred to the Department of Justice for attention.

DEPARTMENT OF JUSTICE,

July 17, 1895.

SIR: I am in receipt of your letter of July 10, 1895, with inclosed memorandum in the matter of the libel proceedings begun against the English steamer *Azov* before the Tribunal of Commerce, Antwerp, on account of a collision with the U. S. S. *Chicago* in the harbor of Antwerp on the 11th of June, 1894.

It appears that the Navy Department, on June 11, 1894, received from Rear-Admiral Erben, by cable, a request for authority to libel the steamer *Azov*, and that the Department immediately replied by cable, giving assent.

The suit was instituted in the name of Alfred T. Mahan, who was the commanding officer of the *Chicago*, and upon the authority given by the Navy Department he employed counsel to represent him.

Employment of Counsel for the United States.

It further appears that the suit was dismissed with costs, on the ground that Captain Mahan was not the proper party plaintiff, and that now the question of appealing the cause, or instituting a new suit in the name of the United States Government, is under consideration.

The question upon which you request an opinion of this Department is thus stated:

"I am, in view of the law establishing the Department of Justice and of the provisions of those sections of the Revised Statutes relating to the employment of counsel to assist in the trial of any case in which the Government is interested, doubtful as to whether the circumstances in this case, the cause coming necessarily under the jurisdiction of foreign courts, are such as to warrant the Secretary of the Navy in employing an attorney to proceed in the matter, and I have the honor, therefore, to request your opinion as to whether this Department should continue the conduct of this case, employing the necessary counsel, or whether the matter should be referred to the Department of Justice for its action and management."

In 7 Opinion, 141, the Hon. Caleb Cushing said:

"According to the traditional practice of the Government it has belonged to the attributes of any head of Department to employ counsel in his discretion for the conduct of legal business arising in his Department. The act of February 26, 1853, for the regulation of fees in the legal business of the Government, expressly recognizes the existence of this power in any head of Department."

Subsequent opinions, which affirmed the right of heads of Departments to employ special counsel in their discretion, founded it on the act of February 26, 1853. (10 Stat., 162; 10 Opin., 43, 48; 12 Opin., 369.)

On June 22, 1870 (16 Stat., 162), was passed "An act to establish the Department of Justice."

The provisions of this act were carried into the Revised Statutes under "Title VIII—Department of Justice."

Section 357 provides as follows:

"Whenever a question of law arises in the administration of the Department of War or the Department of the Navy, the cognizance of which is not given by statute to some

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other officer from whom the head of the Department may require advice, it shall be sent to the Attorney-General, to be by him referred to the proper officer in his Department, or otherwise disposed of as he may deem proper."

Section 365 provides as follows:

"No compensation shall hereafter be allowed to any person, besides the respective district attorneys and assistant district attorneys for services as an attorney or counselor to the United States, or to any branch or Department of the Government thereof, except in cases specially authorized by law, and then only on the certificate of the Attorney-General that such services were actually rendered, and that the same could not be performed by the Attorney-General, or Solicitor-General, or the officers of the Department of Justice, or by the district attorneys."

Section 17 of said act, carried into the Revised Statutes as section 189, provides:

"No head of a Department shall employ attorneys or counsel at the expense of the United States; but when in need of counsel or advice, shall call upon the Department of Justice, the officers of which shall attend to the same."

The act of June 22, 1870, was construed to provide that the Secretary of War had no authority to employ counsel, without the consent of the Attorney-General, to appear in court in habeas corpus cases. (13 Opin., 583.)

An opinion was also given to the effect that the Bureau of Animal Industry could not employ counsel for the defense of the employes of the Bureau for acts done by them in carrying out the duties of their office. (19 Opin., 328.)

The question arises whether or not the above prohibition in the act establishing the Department of Justice is broad enough to forbid the employment of counsel in foreign countries by the Secretary of the Navy to institute a suit in behalf of the United States to recover money for injury to a war vessel of the United States.

The right and duty of a commander of such a vessel, or of the Secretary of the Navy, to employ, in an emergency, counsel in a foreign country when necessary for the protection of such vessel and all that pertains to it are not within the contemplation of this opinion, and would involve prin-

Registry of Wrecked Foreign-built Vessel.

ciples other than those passed upon in determining the question submitted.

The act of June 22, 1870, was passed to correct what was considered an abuse by the heads of Departments of the power to employ counsel. Its terms are undoubtedly broad enough to cover any employment of counsel in cases like that now in question, although they have been so rare that they were probably not a moving cause of the enactment of the law.

Congress, however, must have contemplated, inasmuch as ships of war are constantly on the high seas and in foreign ports, that questions of law would arise in respect of them in the administration of the Navy Department. No exception whatever is made of such cases in section 357 and none in section 189.

I am of the opinion that the Navy Department should not continue the conduct of this case, and that the matter should be referred to the Department of Justice, which is charged with the duty of determining when the United States shall sue, for what it shall sue, and that such suits shall be brought in appropriate cases. (*United States v. San Jacinto Tin Company*, 125 U. S., 273, 279, 280; *In re Neagle*, 135 U. S., 65, 67.)

I return, as requested, the memorandum sent by you, and ask that you will have me furnished a copy of same and of such other papers as may have a direct bearing upon this case.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE NAVY.

REGISTRY OF WRECKED FOREIGN-BUILT VESSEL.

In view of the express regulation and long-established practice of the Treasury Department, which have put a narrow construction on the clause "wrecked in the United States," an application, under Revised Statutes, section 4136, for registry of a foreign-built vessel wrecked and abandoned several hundred miles from the coast of the United States, and subsequently towed into the United States, where she was purchased and repaired by American citizens, the repairs amounting to more than three times the price paid for the wreck at marshal's sale, was properly denied.

Registry of Wrecked Foreign-built Vessel.

The Secretary of the Treasury has the undoubted right to change the regulation and practice of the Department and adopt a more liberal construction of the clause in question.

Following 15 Opinions, 402, it is held that the word "wrecked," in section 4136, "must be taken in a very comprehensive sense * * * as applicable to a vessel which is disabled and rendered unfit for navigation, whether this state of the vessel has been caused by the winds or the waves, by stranding, by fire, by explosion of boilers, or by any other casualty"; and, to carry out the manifest intent of the statute, if any of the injuries which have made a vessel a wreck were received in the United States, in the absence of bad faith, she should be held to be embraced in the clause "wrecked in the United States," although other injuries had been received elsewhere.

DEPARTMENT OF JUSTICE,
July 19, 1895.

SIR: I have the honor to answer the questions in yours of the 10th instant. They are, first, whether the application for registry of the *Southery*, under section 4136, Revised Statutes, which has been denied by your Department on the ground that the vessel was not "wrecked in the United States" was properly refused; and, second, "what, in law, is sufficient injury to answer the condition 'wrecked'?"

It appears from your statement and the accompanying papers that the ship was wrecked and abandoned on Alacran Reef, which is not in the United States, but several hundred miles from our nearest coast, and subsequently towed into the United States, where she was purchased and repaired by American citizens, the repairs amounting to more than three times the price paid for the wreck at marshal's sale, which I presume you consider equivalent to "three-fourths of the cost of the vessel when so repaired," as the application was refused on the ground that the "evidence did not show that the injuries to the vessel, constituting her a wreck, were received in the United States."

In view of the extremely liberal construction which has been given to all the other provisions of section 4136 (9 Opin., 424; 15 Opin., 402; 20 Opin., 253), I should not hesitate to say, if the question remained open, that the clause "wrecked in the United States" was not intended by Congress to limit the benefit of that section to vessels which receive within the boundaries of this country the injuries

Registry of Wrecked Foreign-built Vessel.

which constitute them wrecks, but intended them to apply to any foreign-built vessel in the United States in such a state of wreck as to require virtual rebuilding, provided she should be purchased and repaired by American citizens. This construction certainly carries out the well-known object of the law, and can be given without doing violence to its language, although such language is capable of the other construction, and at first sight seems to carry it.

Your question, however, being whether you rightly denied the application, I am compelled to answer yes, because in so doing you merely followed the express regulation and long-settled practice of your Department, which have put the narrower construction on the clause "wrecked in the United States." And in 1875, in the case of *United States v. The Brig Victoria Perez* (8 Ben., 109), Judge Benedict, having the exact question before him, gave the language the same construction. He conceded the force of the opposing argument, but based his decision upon the long and well settled construction which your Department had given.

The question, therefore, really is one for you to settle yourself, viz, whether you will change the regulations and practice of your Department. You undoubtedly have a right to do this, the true meaning of the law being at least doubtful. Whether you should do it or not depends upon considerations with which you are doubtless quite as familiar as I, and probably more so.

Your second, so far as it is one of law, becomes a moot question unless I assume that you propose to change the practice of your Department or reconsider your finding of fact. As you may do either or both, however, it would not violate the well-settled rule of this Department to answer it. It was rightly held in an opinion given your Department many years ago (15 Opin., 402) that the word "wreck" in section 4136 "must be taken in a very comprehensive sense * * * as applicable to a vessel which is disabled and rendered unfit for navigation, whether this state of the vessel has been caused by the winds or the waves, by stranding, by fire, by explosion of boilers, or by any other casualty." This definition is not broader than the intention of Congress, and you will be justified in holding a vessel to be wrecked

Consul - Attorney-General.

when she is in a condition unfit for use, no matter how brought about. For instance, without attempting to pass upon the disputed question of fact presented by the claims of the applicant and the resistant, if, as claimed by the former, the vessel, though somewhat leaky and injured before, struck ground on her way to Erie Basin, in consequence of which she sank therein, necessitating raising, dry docking, and repairs to put her in such condition that she could go to the place where it had been decided to make the permanent repairs, this would undoubtedly constitute a wrecking, and the vessel would also have been "wrecked in the United States."

There is nothing in what has been said above to prevent the ruling, which I think is required to carry out the manifest object of the statute, that if any of the injuries which have made the vessel a wreck were received in the United States she should be held to come within the law, although others had been received elsewhere.

Nor would failure to use diligence or the best means of avoiding such further injuries prevent the above conclusion, always assuming the absence of bad faith with respect to the registry law in question.

This opinion is to be taken as supplementary to that of my immediate predecessor, with respect to the same case at an earlier stage, to which your letter did not refer, and to which my attention was not called until the above opinion was written.

Respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

CONSUL—ATTORNEY-GENERAL.

When a consul intervenes in a controversy between master and seamen, by mutual consent of the disputants, he acts as an arbitrator and not as consul.

The Attorney-General can not be called upon for an opinion unless specific questions of law are formulated which relate to an existing question calling for the action of the Department requesting it.

Consul—Attorney-General.

DEPARTMENT OF JUSTICE,

July 26, 1895.

SIR: I have your letter of July 24, 1895, inclosing a statement of the United States consul at Havre that the steam yacht *Barraconta*, a foreign-built vessel, owned by a citizen of the United States and unregistered, arrived at that port from the Mediterranean, destination, foreign ports, and that he had intervened on account of disputes and differences that had arisen between the master and first officer on the one side and the chief engineer and cook on the other side.

You request "an opinion upon the facts presented" in the communication from the consul.

You further state: "I should have no hesitation in approving the action of the consul at Havre if the yacht in question were a registered American vessel, but I am unwilling to assume the responsibility of determining the legal status of a foreign-built yacht."

It is not entirely clear to me upon what points you wish an opinion.

It is against the settled practice of this Department to give an opinion upon a general statement of facts without a specification presenting special questions of law. (14 Opin., 367; 20 Opin., 259, 493, 699, 711, 723.)

The Attorney-General can not properly give an opinion where it does not appear that some question exists calling for the action of the Department requesting it. (20 Opin., 383, 420, 465, 618.)

It appears from the consul's statement that what he did was "by mutual consent of master and seamen." It would seem from this that he has exercised no consular authority, and that he in effect acted as arbitrator by consent of parties, and therefore it is not apparent to me that any question arising out of his action is now pending in the administration of your Department.

If there be no question pending in your Department requiring official action necessarily involving a determination of "the legal status of a foreign-built yacht," I would not be warranted in giving to you an opinion upon that subject.

Control of Customs Officers.

If, in the administration of your Department, any action is necessary in respect of what the consul has done in this case, I request that you will formulate specific questions of law upon which you wish to have my opinion.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF STATE.

CONTROL OF CUSTOMS OFFICERS.

A collector of customs is merely a subordinate of the Secretary of the Treasury; and section 15 of the act of June 10, 1890 (chap. 407, 26 Stat., 131), authorizing a collector or the Secretary of the Treasury, if dissatisfied, to apply for a review of the conclusions of law and fact involved in the decision of a Board of General Appraisers, does not mean that the collector may appeal against the decision or wish of the Secretary.

The provisions of section 2652, Revised Statutes, making conclusive upon all customs officers the decisions of the Secretary of the Treasury upon all questions as to the construction and meaning of any part of the revenue laws, remain unaffected by the act of 1890 referred to.

DEPARTMENT OF JUSTICE,

July 27, 1895.

SIR: I am in receipt of your letter of July 26, 1895, requesting an opinion whether or not in a case in which the General Appraisers have decided that an article is not dutiable, section 15 of the act of June 10, 1890, (26 Stat., 138), in so far as it confers upon the collector the power, in case he is dissatisfied with the decisions of the Board of General Appraisers, to apply for a review of their decisions, repeals the authority conferred by section 2652 of the Revised Statutes upon the Secretary of the Treasury to control the officers of customs in the administration of the revenue laws.

Section 2652, Revised Statutes, is as follows:

"It shall be the duty of all officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws; and in case any difficulty shall arise as to the true construction or meaning of any part of the revenue laws, the decision of the Secretary of the Treasury shall be conclusive and binding upon all officers of the customs."

Courts-Martial—U. S. Penitentiaries.

The decisions of the Secretary of the Treasury upon all questions as to the construction or meaning of any part of the revenue laws are by this section made conclusive upon all customs officers.

This law has been in force since 1842, and still remains part of the revenue system of the United States.

A later statute does not abrogate a prior one unless such intention is expressed, or the two are so entirely inconsistent that they can not stand together.

Section 15 of the act of June 10, 1890, provides that "the collector or the Secretary of the Treasury," if dissatisfied, may apply for a review of the questions of law and fact involved in decisions of the Board of General Appraisers. This does not mean that the collector may appeal against the decision or wishes of the Secretary, but that, as either may be the officer who ultimately acts for the Government, the right of appeal is given to either, as the case may be. But if the Secretary has decided any matter no collector can by appeal question such decision.

A collector is merely a subordinate of the Secretary of the Treasury, and no intention to give him such right as against his superior is to be gathered from the act in question.

My opinion is that section 2652 is in full force, notwithstanding anything that is in section 15, and that it is the duty of the collector to follow the decision and instructions of the Secretary of the Treasury in all matters relating to the revenue laws.

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

COURTS-MARTIAL—U. S. PENITENTIARIES.

A prisoner sentenced by a court-martial to confinement in a penitentiary of the United States should not be turned over to a marshal, but should be conducted to the prison by the proper officer of the Department of War.

DEPARTMENT OF JUSTICE,

July 27, 1895.

SIR: Replying to your letter of the 20th instant, with inclosures, in which you request my opinion whether Corpl. John T. Wade, of Company H, Fourth Infantry, who has

Courts-Martial—U. S. Penitentiaries.

been sentenced by court-martial to confinement in the U. S. penitentiary at Fort Leavenworth, is to be transported there by the proper officer of your Department or turned over to the U. S. marshal of the State of Washington, where the court-martial sat, I have the honor to say:

By the provisions of the act of March 2, 1895, which transferred the military prison at Fort Leavenworth to the Department of Justice, to be known and used as a U. S. penitentiary, it is provided that the same is to be conducted in accordance with the provisions of sections 4, 5, 6, 7, 8, and 9 of the act of March 3, 1891, entitled "An act for the erection of United States prisons," etc. Said section 5 provides that the transportation of all U. S. prisoners sentenced to imprisonment in a U. S. penitentiary and their delivery thereat shall be by the marshal of the District or Territory where the conviction occurs, and makes provision for his actual expenses, including transportation, etc., to be paid, on the approval of the Attorney-General, out of the judiciary fund. This provision, however, applies, in my opinion, only to prisoners convicted by the civil courts of the United States, and does not apply to prisoners sentenced by courts-martial.

The provision in the act of March 2, 1895, that prisoners sentenced by courts-martial may be confined in the U. S. penitentiary merely puts such prisoners in charge of the civil authorities on their delivery at the prison, which must be made by the proper officer of the Department to which the sentencing tribunal belonged.

The prisoner named should therefore be conducted to the prison at Fort Leavenworth by the proper officer of your Department, where he will be duly received.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF WAR.

OPINIONS
OF
HON. JUDSON HARMON, OF OHIO.

APPOINTED JUNE 10, 1895.

ATTORNEY-GENERAL—MODIFICATION OF CONTRACTS.

A question of the legality of a provision of long standing in contracts of the War and Navy Departments determined, as presented, in general terms, though a strict regard to the rule of the Department of Justice which forbids the expression of an official opinion upon any question of law which has not arisen in an existing case and presented upon a definite statement of facts, might warrant a refusal of an opinion thereon.

A clause contained in contracts of the War Department providing for future modifications of the contract, set out, and held to be reasonable and proper, and that a modification of such a contract, which does not prejudice the interests of the Government or violate any statutory provision, is not such a new contract as must be preceded by an advertisement for proposals from bidders.

DEPARTMENT OF JUSTICE,

August 13, 1895.

SIR: I have the honor to acknowledge the receipt of a letter of Brig. Gen. W. P. Craighill, Chief of Engineers, of July 27, 1895, addressed to you, and, by your indorsement thereon of August 1, 1895, referred to the Attorney-General, "with request that he will please favor this Department with an opinion upon the question within presented."

A strict regard to the rule of this Department, which forbids the expression of an official opinion upon any question of law which has not arisen in an existing case and presented upon a definite statement of facts, might prevent compliance with your request did it not appear that the provision in the contract upon which the question arises appears to be one

Attorney General—Modification of Contracts.

of long standing in the contracts both of the War and Navy Departments of the Government. The provision referred to is as follows:

"If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: *Provided*, That no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred."

The objection urged against it is stated in the letter of the Chief of Engineers to be that such modification operates to form a new and independent contract between the parties—such a contract as is contemplated and provided for in section 3709, Revised Statutes, as to which advertisements for proposals from bidders are required before the contract can be entered into.

This objection seems to give to the word "modification" the same meaning as "formation" or "creation." "Modified," as defined by Stormonth, is "to change slightly, as in the form or in the external qualities of a thing;" and by Webster, "to change somewhat the form or qualities of."

It would be remarkable, indeed, in view of the diversity of subjects-matter and conditions under which public contracts of the Government are made, that modifications to meet the infinite contingencies to which the limits of the human forecast and sagacity subject us could not, even by consent of the contracting parties, be made without rescinding and abrogating the entire contract. Certainly no such rule is known in the general law of contracts. The minds which agreed to form may in like manner agree to modify.

But here, in recognition and contemplation of such con-

Attorney General—Modification of Contracts.

tingencies, the provision for the future modification is made part of and expressed in the very contract itself. The objection, however, appears to be directed to the power of the Executive Department of the Government to make such contract, because, as is said, the modification made in pursuance of such provision in the contract—whether as to subject-matter or as to terms—is a departure from what was advertised in the proposals; that the bidders are not, therefore, put upon equal terms, and that the beneficial object of advertising for proposals from bidders is impaired, if not defeated, by such subsequent modifications.

It will be seen, however, that those provisions of the statute which require advertisements for proposals of bidders impose no such rigorous or restricted limitations to the power of the executive officer by whom the contract was to be made.

It is true, as was held by the Attorney-General in 1869 (13 Opin., 174), that where an advertisement for proposals for furnishing the Government with stamped envelopes, etc., stated a definite term and did not provide for any extension of the contract beyond the term, but the contract contained a provision that it might be extended or modified by mutual agreement, and it was subsequently modified and extended repeatedly so as to embrace several successive years, that such extensions were each new contracts, which should have been preceded by advertisements for proposals. He said:

“If a Postmaster-General can extend a contract in this manner for four years without opportunity for anyone to compete for the supply of an article of such large consumption, I know no limit to his power in that respect. If it be a valid contract binding upon the Government, although extending beyond his own term of office, it binds his successors and cuts off for the term for which he chooses to fix the contract all advantage to the Government of any changes in the market by which a saving could be effected.”

The executive officers of the Government are expressly prohibited from making contracts to extend beyond one year and for which no appropriation by Congress has been made.

The question now under consideration not arising from

Attorney General—Modification of Contracts.

any actual statement of facts, in an existing case, can be determined only as it is presented in general terms.

In *United States v. Corliss Steam Engine Company* (91 U. S., 321) the question was presented as to the power of the Secretary of the Navy to suspend work contracted for, when from any cause in his opinion the public interest requires such suspension, and to settle with the contractor upon such terms as may be agreed on for the partial performance of the contract. The Supreme Court, speaking through Mr. Justice Field, said:

“Contracts for the armament and equipment of vessels of war may, and generally do, require numerous modifications in the progress of the work where that work requires years for its completion. With the improvements constantly made in ship building and steam machinery and in arms, some parts originally contracted for may have to be abandoned and other parts substituted, and it would be of serious detriment to the public service if the power of the head of the Navy Department did not extend to providing for all such possible contingencies by modification or suspension of the contract and settlement with the contractors.”

And on the basis of that decision, Mr. Attorney-General Brewster, in a case submitted for his opinion (18 Opin., 101), held:

“It is clearly competent to the Secretary of the Navy to assent to a modification of the contract for building these vessels where the interests of the Government will not be prejudiced or any statutory provision violated thereby.”

From which it would seem that at least the power to modify the terms of an existing contract on the part of the Secretary of the Navy has been judicially recognized.

But in *Ferris v. United States* (28 C. Cls. R., 332) the contract under consideration was the very contract and containing the identical provision which is the subject of consideration here. And in that case the validity of the contract and the propriety of the provision, and the power of the Chief of Engineers on behalf of the Government, are not even questioned, but were recognized and cited approvingly by court in its opinion.

Both upon reason and authority, then, I am clearly of opinion

Member of Congress—Appointment to Office.

that such provision for future modification was reasonable and proper and within the power of the Chief of Engineers to make. That a modification "where the interests of the Government will not be prejudiced or any statutory provision violated thereby" may well be provided for in every contract to which the Government is a party; and that a contract so modified is not such a new contract as must be preceded by an advertisement for proposals from bidders.

Very respectfully,

HOLMES CONRAD,
Acting Attorney-General.

The SECRETARY OF WAR.

MEMBER OF CONGRESS—APPOINTMENT TO OFFICE.

During the term of R. as a Senator of the United States, Congress increased the salary attached to a civil office under the authority of the United States. On February 23, 1895, the President nominated R. (whose term in the Senate would not expire until March 4, 1895) to the office in question, and, on the same day, such nomination was confirmed by the Senate. R. took the oath of office on March 4, 1895, and his commission was delivered to him on the following day. *Held,*

1. The nomination by the President and confirmation by the Senate constituted the *appointment* to the office in question; and
2. Such appointment was a nullity, because in conflict with paragraph 2, section 5, Article I of the Constitution, which prohibits the appointment of a Member of Congress during the term for which he was elected, to an office, the emoluments whereof shall have been increased during such time.

DEPARTMENT OF JUSTICE,
August 15, 1895.

SIR: I have the honor to acknowledge the receipt of your communication of August 10, inclosing a copy of the decision of the Auditor for the State and other Departments and requesting my opinion upon the following statement of facts, to wit:

"Matthew W. Ransom was the United States Senator from the State of North Carolina for the term beginning March 4, 1889. During the said term the salary of envoy extraordinary and minister plenipotentiary to Mexico was increased from \$12,000 to \$17,500 per annum by act of Congress approved March 3, 1891, making appropriations for the

Member of Congress—Appointment to Office.

diplomatic and consular service. (26 Stat., 1053.) Congress has since continued to appropriate the latter sum. On February 23, 1895, Mr. Ransom was nominated by the President as envoy extraordinary and minister plenipotentiary to Mexico, and the nomination was confirmed the same day. The commission bears date of February 23. According to the statement of the President and his private secretary, Mr. Thurber, the commission was signed March 5. Mr. Ransom took the oath of office March 4, after the Senatorial term had expired, and his commission was delivered to him the following day."

The occasion of your request for my opinion, as to the duty of the Department of State in the premises, appears to be a decision of the Auditor for the State and other Departments, holding that Mr. Ransom is not entitled to salary as envoy extraordinary and minister plenipotentiary to Mexico, because of the constitutional prohibition of section 6 of Article I of the Federal Constitution.

Paragraph 2, section 6, Article I of the Constitution is as follows:

"No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either House during his continuance in office."

Here is contained a prohibition against the *appointment* to office of Senators and Representatives; and also a prohibition against one *holding* an office from being a member of either House of Congress.

It has been repeatedly held that the acceptance of any office under the United States by a member of either House of Congress operates a vacation of his seat. He is disabled by the Constitution from holding an office while a member of either House.

The case in hand, however, is governed by the other prohibition, which is against the appointment to any civil office under the authority of the United States, the emoluments whereof have been increased during the time for which the Senator or Representative appointed to such office was elected.

Member of Congress—Appointment to Office.

Here, plainly, the prohibition is not against the holding, but against the appointment.

Under section 2, Article II of the Constitution, power is given the President to—

“Nominate, and by and with the advice and consent of the Senate, to appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law.”

He can appoint, however, only those who, under the Constitution, are eligible to office. His appointment of one not eligible is a nullity.

One who was a Senator or Representative during the time in which the emoluments of any civil office under the authority of the United States was increased is eneligible to such office.

Judge Story says:

“The reasons for excluding persons from offices who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the Representative and to secure to the constituents some solemn pledge of his disinterestedness. The actual provision, however, does not go to the extent of the principle, for his appointment is restricted only during the time for which he was elected, thus leaving in full force every influence upon his mind, if the period of his election is short, or the duration of it is approaching its natural termination.” (*Story on Constitution*, sec. 667.)

It is suggested in your letter that the commission of Mr. Ransom was not actually signed by the President until the 5th of March, which was after the expiration of the time for which Mr. Ransom was elected a Senator in Congress.

But it must be observed that the language of the Constitution is that “no Senator shall, during the term for which he was elected, *be appointed* to any civil office under the authority of the United States.”

In *Marbury v. Madison* (1 Cranch., 155) the Chief Justice, speaking for the court, after reciting the act of Congress, said:

“These are the clauses of the Constitution and laws of the

Member of Congress—Appointment to Office.

United States which affect this part of the case. They seem to contemplate three distinct operations:

“1. The nomination. This is the sole act of the President, and is completely voluntary.

“2. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate.

“3. The commission. To grant a commission to a person appointed might, perhaps, be deemed a duty enjoined by the Constitution. ‘He shall,’ says that instrument, ‘commission all the officers of the United States.’

“The acts appointing to office and commissioning the person appointed can scarcely be considered as one and the same, since the power to perform them is given in two separate and distinct sections of the Constitution.”

The vital question here, then, would seem to be, not when was Mr. Ransom *commissioned*, but when was he *appointed*?

Although he might have been commissioned on the 5th day of March, yet if he was nominated and confirmed on the 23d of February, that, under the rule stated, would seem to be the date of his appointment.

And this view is confirmed by the facts stated by you, that, having been nominated and confirmed on the 23d of February, although not actually commissioned until the 5th day of March, yet on the 4th day of March Mr. Ransom took the oath as envoy extraordinary and minister plenipotentiary to Mexico.

I am of opinion, then, that Mr. Ransom's appointment as envoy extraordinary and minister plenipotentiary to Mexico was made on February 23, 1895; that that was during the time for which he was elected a Senator in Congress, and it appearing from your letter that it was during that time the emoluments of the office of minister to Mexico were increased, Mr. Ransom was not, in my opinion, eligible to appointment to that office.

Very respectfully,

HOLMES CONRAD,
Acting Attorney-General.

The SECRETARY OF STATE.

Washington Monument.

WASHINGTON MONUMENT.

Congress has made provision for the protection of the Washington Monument from chipping vandals, by the act of July 20, 1892, chapter 320, section 1, which provides "a penalty of not more than \$50 for each and every such offense," and in the police protection authorized by the appropriation act of October 2, 1888, chapter 1069, whereby the Secretary of War is "charged with the custody, care, and protection of the monument," and an appropriation is made for a custodian and other employees necessary for its care.

DEPARTMENT OF JUSTICE,

August 24, 1895.

SIR: Replying to your request for information whether any action can be taken for the protection of the Washington Monument from chipping vandals, I have the honor to say that there appears to be none in the way of criminal proceedings except arrest and prosecution under the act of July 20, 1892, chapter 320, section 1 (27 Stat., 332), which provides "a penalty of not more than \$50 for each and every such offense." Section 18 of that act provides that prosecutions "shall be conducted in the name of and for the benefit of the District of Columbia, and in the same manner as now provided by law for the prosecution of offenses against the laws and ordinances of said District;" and that "any person who shall fail to pay the fine or penalty imposed, or give security where the same is required, shall be committed to the workhouse of the District of Columbia for a term not exceeding six months for each and every offense."

The act of March 3, 1891, chapter 536 (26 Stat., 848), gives the police court original jurisdiction of such prosecutions concurrently with the supreme court of the District of Columbia.

By the appropriation act of October 2, 1888 (25 Stat., chap. 1069), you are "charged with the custody, care, and protection of the monument," and an appropriation is made for a custodian and other employees necessary for its care. The police protection thus authorized, with the penalty above named, seem to have been thought by Congress sufficient.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF WAR.

World's Fair.

WORLD'S FAIR.

The receipt and distribution of medals and diplomas awarded by the World's Columbian Commission at Chicago in 1893 are purely ministerial acts. They could therefore be delegated by the Commission; and they were delegated, so that delivery can be made either to its executive committee or to the board of reference and control.

The Secretary of the Treasury has no power to make distribution to the exhibitors directly.

DEPARTMENT OF JUSTICE,

August 26, 1895.

SIR: I have the honor to acknowledge your communication of August 20, asking my official opinion as to the distribution of the medals and diplomas awarded to certain exhibitors at Chicago the World's Fair of 1893. Your letter states no facts, but I understand that the awards to successful exhibitors at the Fair have all been made, and that the validity of these awards is unquestioned. I understand, further, from your inquiries that the medals and diplomas have all been prepared, and that nothing remains to be done except for you to deliver them to the proper person or body of persons who are in turn to deliver them to the successful exhibitors.

Your third question is: "Can the World's Columbian Commission authorize any committee or subordinate body thereof to receive and distribute the said medals and diplomas?" Such receipt and distribution are purely ministerial acts, involving no exercise of discretion. (See *Butterworth v. Hoe*, 112 U. S., 50.) I am very clearly of the opinion that these duties, which are entirely distinct from the discretionary function of making the awards, could be delegated by the Commission. That body had express authority to appoint committees by the act of April 25, 1890, chapter 156, section 4 (26 Stat., 63), and while the World's Fair was to close not later than October 30, 1893 (sec. 9), it was contemplated that the Commission might remain in existence for over four years thereafter (sec. 14) for the purpose of winding up. It could not have been contemplated that the whole unwieldy body should be brought together for purely ministerial acts. In fact, meetings of a full Commission were expressly discouraged by Congress. (Act of August 5, 1892, chap. 380, 27 Stat., 363.) In providing, therefore, that the "medals and

World's Fair.

diplomas shall be delivered to the World's Columbian Commission to be awarded to exhibitors" (act of March 3, 1893, chap. 208, 27 Stat., 587), I think that Congress intended that delivery to a duly authorized agent of the Commission should be sufficient.

The Commission is not now in session, and the Treasury Department is ready to deliver the medals and diplomas. Your second question asks to what officer the delivery should be made. This depends upon the by-laws of the World's Columbian Commission and such proceedings as may regularly have been had thereunder. You furnish me with two pamphlets, one entitled "By-Laws (as amended) of the World's Columbian Commission," and bearing no date; the other entitled "Official Minutes of the Executive Committee of the World's Columbian Commission, from December 12 to December 19, 1893, inclusive." In a memorandum which you have presented to me with the papers, you refer me also to a certain rule adopted by the board of reference and control appointed by said Commission, and which, as you there state, is the rule referred to in the proceedings of the executive committee of December 18, 1893. I have no official knowledge of the by-laws or resolutions of this Commission, or of any of its subordinate committees, and must confine myself to the consideration of such as you furnish me with.

Article 5 of the by-laws provides for the appointment of an executive committee which, "when the Commission is not in session, shall have all the powers of the National Commission, except in cases in which the act of Congress requires the action of the Commission or a majority of the Commissioners." It further provides that "the committee may make such regulations for its own government and the exercise of its functions through the medium of such subcommittees as it may consider expedient," and "shall select such employees and agents as may be necessary." Article 17 establishes a "board of reference and control" of eight members, "upon which board are conferred all the powers and duties of the Commission when the said Commission or its executive committee shall not be in session, except in cases in which the act of Congress requires the action of the Commission or of a majority of the Commissioners."

World's Fair.

After the close of the actual exhibition it became necessary to provide in some way for the promulgation of the awards and the distribution of the medals and diplomas. You inform me that the board of reference and control adopted a rule, called "Rule XI," providing that this should be done by the Commission itself or by said board. On December 18, 1893, the executive committee amended this rule so as to provide that the committee of awards should report the result of the work of the judges "to the World's Columbian Commission or its executive committee, or, in its absence, to the board of reference and control, by whom the formal promulgation of the awards and the distribution of the medals and diplomas shall be made with appropriate ceremonies."

It is my opinion, therefore, that you are authorized to deliver the medals and diplomas to the executive committee, and that if the executive committee shall not be in session you are authorized to deliver them to the board of reference and control. This answers your second question. As I do not understand that you desire a meeting of the full Commission to be called, unless that course is unavoidable, the answers to your second and third questions dispense with the necessity of answering your fifth question.

The first and fourth questions substantially put the inquiry, whether you are authorized to distribute these medals and diplomas to the exhibitors without first actually delivering them to the World's Columbian Commission. This inquiry is suggested by certain provisions of the act of March 2, 1895, chapter 189 (28 Stat., 928). The provisions referred to authorize you to procure suitable cases for the medals, "and to pay for the same and also the expense of distributing said medals." They also authorize you to do certain work at the public expense upon the diplomas. You are not directed to provide for the expense of distributing the diplomas. I do not think that these statutory provisions authorize you to disregard the committees appointed by the World's Columbian Commission and deal yourself directly with the exhibitors. Your first and fourth questions are therefore answered as follows: That you may make delivery to the World's Columbian Commission through its duly authorized agencies

Attorney-General.

above mentioned, but that you have no authority to make distribution to the exhibitors directly.

I return herewith the amended by-laws and the December minutes of the executive committee; also the letters received by you from the acting chairman of the executive committee on awards and from the president of the World's Columbian Commission.

Very respectfully,

EDWARD B. WHITNEY,

Acting Attorney-General.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

The Attorney-General can give no opinion upon a case not actually arising in the Department the head of which requests the opinion.

DEPARTMENT OF JUSTICE,

September 7, 1895.

SIR: I have the honor to acknowledge your communication of September 5, with inclosures, asking my official opinion concerning the ownership of certain machinery located in the sugarhouse of the Audubon Park Sugar School, at New Orleans, La. It appears that this machinery was paid for out of moneys of the United States, by authority of the then Commissioner of Agriculture, in 1888, but that it is not in your possession or control. It is in the hands of some person or corporation not connected with the United States Government. It further appears that, believing the title to this machinery to be in the United States, you have sold it at public auction, and that the purchase moneys have been paid and are in the Treasury. The persons in possession of the machinery refuse to deliver it, claiming that it has become their property by gift from the United States or otherwise. I do not see that there is any official action which you can take in the premises. The question is at present one between the purchasers and the persons in possession. If any claim is made against the United States it will not be presented to your Department. Under these circumstances, it is not a question upon

Attorney-General.

which the Department of Justice can officially advise you.
(20 Opin., 724.)

Very respectfully,

EDWARD B. WHITNEY,
Acting Attorney-General.

The SECRETARY OF AGRICULTURE.

ATTORNEY-GENERAL.

When an opinion is desired by the head of a Department a statement of facts upon which the question arises must be submitted. The Attorney-General can not investigate the papers for the purpose of ascertaining these facts.

DEPARTMENT OF JUSTICE,

September 10, 1895.

SIR: Your indorsement upon the file of papers of the War Department transmitted to me, in which you request an opinion "whether the amount can be paid as recommended by the Board in their report of August 15, 1895, herewith, attention being especially invited to the written views of the Judge-Advocate-General and to the preceding remarks of the Chief of Engineers," was to-day received.

It has been uniformly held by my predecessors that, when an opinion is desired by the head of a Department, a statement of the facts upon which the question arises must be submitted. The Attorney-General can not investigate the papers for the purpose of ascertaining these facts. (12 Opin., 206; 14 Opin., 367; 19 Opin., 396-467, 696; 20 Opin., 270, 493, 526, 711.)

I respectfully return the file and request that you will formulate the facts and state the questions of law upon which you wish an opinion.

Respectfully,

HOLMES CONRAD,
Acting Attorney-General.

The SECRETARY OF WAR.

Attorney-General—Comptroller of the Treasury—Secretary of War.

COMPTROLLER OF THE TREASURY.

Whether certain expenses of the Department of Agriculture are payable from a certain appropriation for that Department is a question which should have been addressed to the Comptroller of the Treasury.

DEPARTMENT OF JUSTICE,

September 14, 1895.

SIR: Replying to your request of September 3, for my official opinion whether certain expenses are payable from your appropriation for the distribution of seeds, I beg to say that your question comes within the rule and not within the exception stated by my predecessor (20 Opin., 655; 21 Opin., 178, 183, 188) and should, therefore, be addressed to the Comptroller of the Treasury.

Respectfully,

JUDSON HARMON,

Attorney-General.

The SECRETARY OF AGRICULTURE.

SECRETARY OF WAR.

The Secretary of War, under the river and harbor act of August 18, 1894, and the act of April 24, 1888, has full authority to condemn whatever land may be needed for the construction of the boat railway provided for in the former act.

If a change in the location of an existing railway is a necessity in the building of said boat railway, the acquisition by the Secretary of War of the necessary land to make such change is merely an incident to the enterprise intrusted to him.

DEPARTMENT OF JUSTICE,

September 14, 1895.

SIR: I have the honor to acknowledge the receipt of the letter of the Acting Secretary of War of July 9, with the accompanying papers, upon which my opinion is asked whether, on the facts and circumstances shown thereby, you have authority, without further legislation, to acquire by condemnation the right of way for the boat railway provided for in the river and harbor act of August 18, 1894 (28 Stat., 359).

It appears that the right of way required for such boat railway crosses or encroaches at several points upon the right of way of the Oregon Railway and Navigation Company,

Secretary of War.

now actually occupied in the operation of its railway; that said company is willing that such portions of its right of way may be taken on condition that it be furnished by the Government with sufficient space to change the location of its railway without impairing its continuity, and that such change be made without cost to it.

You suggest a doubt, raised by the letter of the United States attorney which you inclose, as to your right, under existing laws, to condemn the land required for such changes in the line of said company's railway.

I do not think any further legislation is required, or is possible. You have full authority under the act referred to and that of April 24, 1888 (25 Stat., 94), to condemn whatever land may be needed for the construction of the boat railway. You state that it is impracticable to operate such railway with crossings of any other line, and that the proposed location is required. The change in the location of the existing railroad is therefore a necessity in the building of the boat railway, and your acquisition of the necessary land to make such change is merely an incident to the enterprise intrusted to you. If it be not such incident, and therefore included within your present authority, I do not see how authority can be given you, because Congress has no right to condemn the property required upon any other theory than its necessity for the prosecution of your work.

The statement and proof of the above facts and necessity in the application for condemnation of the land will, in my judgment, give the court full authority to appropriate the land needed.

If you desire to make the arrangement suggested with the railroad company, and institute condemnation proceedings for the lands shown by the plat submitted to me, I will, if you desire it, send additional instructions to the United States attorney.

Respectfully,

JUDSON HARMON.

The SECRETARY OF WAR.

Appropriation—Damages.

APPROPRIATION—DAMAGES.

The appropriation by the act of March 2, 1895, for raising the height of the dam at Great Falls, and for damages on account of flooding of land and other damages, was intended to cover all damages that might result from raising the dam $2\frac{1}{2}$ feet higher than had been contemplated under the act of July 15, 1882.

DEPARTMENT OF JUSTICE,

September 14, 1895.

SIR: I have the honor to acknowledge your communication of September 12, relating to the expenditure of the appropriation by act of Congress approved March 2, 1895, "for raising the height of the dam at Great Falls, together with the cost of such other work as may be found necessary in connection therewith, including the cost of strengthening the conduit, and for damages on account of flooding of land and other damages."

I have considered the matter quite thoroughly and have examined the papers accompanying your communication, and am of opinion that the amount of \$12,300 appropriated by the act approved July 15, 1882, was intended to cover the damages likely to result from raising the embankment between the Potomac River and the canal to the height at that time contemplated; and that the sum of \$15,000 recommended by the commission consisting of an officer of the Corps of Engineers and the engineer selected by the canal authorities to "report in regard to the damage that would probably be sustained by the Chesapeake and Ohio Canal by raising the Washington Aqueduct dam at Great Falls $2\frac{1}{2}$ feet" was intended to cover all the damages that might result from raising the dam $2\frac{1}{2}$ feet higher than had been contemplated under the act approved July 15, 1882.

The suggestion that the actual amount of the damages resulting from increasing the height of the dam $2\frac{1}{2}$ feet can only be determined by waiting until injuries are actually inflicted does not commend itself as altogether practicable; and the suggestion of the Chief of Engineers, that "an ounce of prevention is better than a pound of cure," is approved by all past experience.

I am of opinion, on the whole case as presented, that the Department is authorized to pay the \$15,000 as recommended

District of Columbia—Illegally Stretching Wires—Attorney-General—Duties.

by the commission and the Chief of Engineers from the money appropriated by the act of March 2, 1895. The inclosures accompanying your letter are herewith returned.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved:

JUDSON HARMON.

The SECRETARY OF WAR.

DISTRICT OF COLUMBIA—ILLEGALLY STRETCHING WIRES.

The stretching of wires without authority across the Iowa reservation in the District of Columbia is governed by section 1818 of the Revised Statutes, and should be brought to the attention of the Secretary of the Interior.

DEPARTMENT OF JUSTICE,
September 16, 1895.

SIR: In reply to the question whether or not the Chief of Engineers is authorized to cut down wires stretched, without authority, across the Iowa reservation in the District of Columbia, and which was erected in the absence of the watchman, my opinion is that section 1818 of the Revised Statutes, which provides that "the Secretary of the Interior is directed to prevent the improper appropriation or occupation of any of the public streets, avenues, squares, or reservations in the city of Washington, belonging to the United States, and to reclaim the same if unlawfully appropriated," governs in this case, and that this is a proper matter to be brought to the attention of the Secretary of the Interior.

Respectfully,

JUDSON HARMON.

The SECRETARY OF WAR.

ATTORNEY-GENERAL—DUTIES.

An opinion which could have been asked of the Comptroller of the Treasury is given by the Attorney-General, it appearing that the question is one of importance, and the Comptroller joins in requesting the opinion.

Attorney-General—Duties.

Cases stated in which duties can be refunded to the importer on the ground that they were collected by mistake.

DEPARTMENT OF JUSTICE,

September 21, 1895.

SIR: Your communication of September 10 asks an official opinion as to your power to refund customs duties in certain cases.

This question, like other questions involving the right to disburse moneys, is one which belongs more properly to the sphere of the Comptroller of the Treasury since the act of July 31, 1894, chapter 174, section 8, and hence Attorney-General Olney declined to answer it. (21 Opin., 188.) Mr. Olney had, however, held that this Department might properly still consider questions of this class "in matters of great importance" (21 Opin., 179), and did so in one case, where the Comptroller himself joined in asking the opinion (21 Opin., 183). His rulings in this regard have been approved by the present Attorney-General in an opinion rendered to the Secretary of Agriculture September 14, 1895. In sending the question here a second time, however, you state that the Comptroller advises you that under the circumstances the opinion of this Department will be followed by him. As the question is one of importance, and the Comptroller thus joins in asking that it be answered here, I proceed to its consideration on the merits.

It appears that certain goods which were dutiable, according to the rulings of your Department, under the tariff act of 1894, were actually subjected by the customs officials to higher rates of duty under the tariff act of 1890. The importers protested against this exaction, but their protests were insufficient, as held by the Board of General Appraisers, in one case for insufficiency of specification, in the other for delay in filing.

You now ask whether you have the power to refund the excess of duties, notwithstanding that no lawful protests were filed by the importers.

Sections 3012½ and 3013 of the Revised Statutes have been repealed, but the act of March 3, 1875, chapter 136, is still in force (21 Opin., 153), and, with the customs administrative

Attorney-General—Duties.

act of June 10, 1890, chapter 407, contains all of our legislation upon the subject of refunds for error in imposition of duties.

The cases in which you are authorized to make such refunds, in the absence of a proper protest, are the following. First, when the duties as provisionally fixed and paid upon entry of the goods, called "unascertained duties," are reduced upon the final liquidation (Cust. Adm. Act, sec. 24); second, for mere clerical error (*id.*); third, for "errors of fact." (Act of 1875, sec. 1.) The latter provision, in my opinion, refers to mistakes of fact in the meaning of the common law—that is, to mutual mistakes of fact—a mistake of fact on the Government's part alone being provided for elsewhere in the section last cited, under the name of "an erroneous view of the facts in the case." In the latter contingency the importer can ask for a refund only when he duly protested. This construction of the act of 1875 gives effect to all of its somewhat obscure provisions. A mistake of the customs officials, duly pointed out by the importer in his protest, may be remedied, if a mistake of law, after the importer's position has been sustained by a judicial decision. It may be remedied, if a mistake of fact, when a reexamination of the goods satisfies the Secretary that the officials were mistaken. For a mutual mistake of law, the importer has no remedy. For a mutual mistake of fact, he may have a remedy if he discovers the mistake within one year from the payment of the duties, and brings it to the notice of the collector within ten days after its discovery.

As these importers come within none of the classes above mentioned, the mistake being a mistake of law, not duly protested against, your question must be answered in the negative.

Very respectfully,

HOLMES CONRAD,
Acting Attorney-General.

THE SECRETARY OF THE TREASURY.

Collisions—Statutory Construction.

COLLISIONS—STATUTORY CONSTRUCTION.

The provision of section 4234, Revised Statutes, requiring sailing vessels to show a lighted torch on the approach of any steam vessel during the nighttime, was not repealed by section 3 of the act of February 19, 1895.

Repeals by implication are permitted only in cases of absolute inconsistency.

DEPARTMENT OF JUSTICE,

September 25, 1895.

SIR: In a letter of 12th instant you ask my opinion whether the provision of section 4234, requiring sailing vessels to show a lighted torch on the approach of any steam vessel during the nighttime, was repealed by section 3 of the act of February 19, 1895, which reenacts portions of section 4234, but omits that relating to torches.

I have the honor to say that in my opinion there was no such repeal.

Section 4234 is part of the general chapter 5 relating to navigation, and providing rules for preventing collisions, to be observed by American vessels on all waters. August 19, 1890, an act was passed (26 Stat., 320) making regulations for preventing collisions, to be observed by American vessels on the high seas and connecting waters. This act was passed pursuant to a plan for the adoption of a common code of regulations by maritime nations, and therefore section 3 provided that it should take effect at a time to be fixed by the President's proclamation. Such proclamation has not been issued, and the act, therefore, is not yet in force.

Congress, however, anticipating that such proclamation would be issued on or before March 1, 1895, passed two acts, which, with that of 1890, would cover the various navigable waters formerly dealt with together in the general chapter on navigation.

The first was that of February 8, 1895 (28 Stat., 645) providing rules for preventing collisions, to be observed by American vessels "upon the Great Lakes and their connecting and tributary waters as far east as Montreal." It was made to take effect on and after March 1, 1895.

The other was that of February 19, 1895, to which you refer (28 Stat., 672), which covered "harbors, rivers, and

Collisions—Statutory Construction.

inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal," and is stated in the caption to be supplementary to the act of August 19, 1890, above mentioned. Article 30 of the act of 1890 had provided for special rules for harbors, etc., and the act of February 19, 1895, undertook to provide these on and after March 1, 1895, by adopting as such special rules the provisions of certain sections of the Revised Statutes which are mentioned by number and include 4233, but not 4234. In section 3 the first part of the first sentence of section 4234, requiring all sailing vessels to be furnished with proper signal lights, is literally quoted, but the last part of the sentence, requiring the showing of a lighted torch, is omitted. The last sentence of section 4234, providing the penalty, is also repeated, changing the expression "navigated without complying with the provisions of this and the preceding sections" to "navigated without complying with the statutes of the United States or the regulations that may be lawfully made thereunder."

The act of August 19, 1890, section 2, repeals all laws and parts of laws inconsistent with its own provisions, but such repeal, even if it applied to section 4234 in so far as that section relates to harbors, has not taken effect.

The act of February 8, 1895, likewise repeals all laws and parts of laws inconsistent therewith, so far as applicable to the navigation of the Great Lakes, etc.

The act of February 19, 1895, contains no express repeal in any form.

This state of legislation is novel, and the question presented is not easy to answer, but in view of the established rules which permit the declaration of repeals by implication only in cases of absolute inconsistency (3 Howard, 646; 16 Peters, 362), section 4234 can not be held to be repealed, and its provisions therefore applied to the case of the schooner *Wm. A. Steelman* in the harbor of Baltimore, to which your question relates.

Respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

Duties—Exports—Meat—Inspection.

DUTIES.

21 Opinions, 110, reaffirmed as to drawback of duties on lead in imported silver ores.

DEPARTMENT OF JUSTICE,

September 25, 1895.

SIR: You were advised (21 Opin., 110) that lead made in this country in a smelter from a mixture of domestic and imported silver lead ores was not entitled, upon exportation, to any drawback under section 25 of the tariff act of 1890, chapter 1244, because that part of the lead which came from the imported ore did not so appear that its quantity or measure could be ascertained in the method contemplated by that act.

Your letter of September 19 inquires whether "white lead" (carbonate of lead) manufactured in the United States from pig lead produced as aforesaid is entitled, on exportation, to drawback under the section above named or under section 22 of the tariff act of August 27, 1894, chapter 349. You do not state the ingredients of this manufacture other than lead, and I understand your question to be whether any drawback can be allowed by reason of the existence of product of foreign ore in the lead of which the manufactured article is partly composed. The reasons given in the opinion above cited fully cover the case now presented, which is really the same in another form. I therefore answer no.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

EXPORTS—MEAT—INSPECTION.

An act of Congress providing for the inspection of beef intended for exportation, and that no clearance shall be given to any vessel having on board for exportation uninspected beef, does not authorize the making of a regulation by the Secretary of Agriculture requiring that meats other than beef products shall be so marked as to show the species of animal from which it was produced, classifying all unmarked packages of meats as uninspected beef, and refusing clearance to vessels having on board such unmarked packages.

Exports—Meat—Inspection.

DEPARTMENT OF JUSTICE,

September 28, 1895.

SIR: I have the honor to acknowledge the receipt of your letter of September 19, 1895, inclosing a copy of an "Order concerning the exportation of meat," of August 28, 1891, and asking whether or not that portion of the regulation requiring the marking of packages of meats other than beef products, providing for classifying such unmarked packages as uninspected beef, and the refusal of clearance because of the assumption that such unmarked packages contain uninspected beef, is consistent with the law.

The regulation in question is as follows:

"It is ordered that from and after September 16, 1895, all beef offered for transportation, whether fresh, salted, canned, corned, or packed, shall be accompanied by a certificate showing that the cattle from which it was produced were free from disease and the meat sound and wholesome, by an inspector of this Department. And in order that it may be determined whether all beef has been so inspected and found to be wholesome, it is further ordered that the meat of all other species of animals which for any reason does not bear the inspection tags and stamps of this Department, shall be packed in barrels, cases, or other packages, which are legibly marked in such manner as to clearly indicate the species of animal from which the meat was produced. Meat which is not so marked, and which is not accompanied by a certificate of inspection, will be classed as uninspected beef and will not be allowed exportation.

"Notice is hereby given to exporters of meat, whether said meat is fresh, salted, canned, corned, packed, or otherwise prepared, and to owners and agents of vessels upon which said meat is exported, that no clearance can be given to any vessel having on board said meat until the provisions of this order are complied with."

This order is based on section 2 of the act approved March 2, 1895 (28 Stat., 732), which is as follows:

"That the Secretary of Agriculture shall also cause to be made a careful inspection of all live cattle the meat of which, fresh, salted, canned, corned, packed, cured, or otherwise

Exports—Meat—Inspection.

prepared, is intended for exportation to any foreign country, at such times and places and in such manner as he may think proper, with a view to ascertain whether said cattle are free from disease and their meat sound and wholesome, and may appoint inspectors who shall be authorized to give an official certificate clearly stating the condition in which such cattle and meat are found, and no clearance shall be given to any vessel having on board any fresh, salted, canned, corned, or packed beef being the meat of cattle killed after the passage of this act for exportation to and sale in a foreign country from any port in the United States until the owner or shipper shall obtain from an inspector appointed under the provisions of this act a certificate that said cattle were free from disease and that their meat is sound and wholesome."

This section relates alone to live cattle and the meat of cattle.

Any reasonable regulation affecting these and these alone is authorized by the statute.

However desirable it might be to effect the object of the statute, this result can not be reached by regulating commerce in respect of commodities not embraced in the statute.

The fact that the purpose of the statute may practically fail of realization, unless the regulations be extended to other articles of commerce, would be no warrant for such extension.

The order in question, for the purpose of identifying the products of cattle, directs that meat of all other species of animals shall be marked in such manner as to clearly indicate the species of animal from which the meat was produced.

Thus, in aid of the regulation of commerce in beef, and to give practical effect to the inspection provided for, jurisdiction is assumed over other meats not embraced in the statute.

On the same principle an order might be made regulating the marking of all other articles of commerce contained in barrels, cases, or other packages, and on the ground that this is necessary for the purpose of segregating and identifying the beef, so that the rule not permitting a vessel having on board beef, unaccompanied by a proper certificate, to clear could be enforced.

This is an extreme illustration, and I do not mean to

Duties—Delivery to Importers.

suggest that there is any probability of such an extension, but it tests the soundness of the regulation in question.

The provision in question, coupled with the restriction upon the clearance of vessels, is a regulation affecting commerce in respect of commodities not controlled by the statute.

Under it a vessel having no beef on board, but other meat, could not clear unless such meats were marked as provided for in this order.

I am of the opinion that the provision in question is not warranted by the statute.

This opinion does not cover by implication the question of your authority to make regulations affecting the clearance of vessels, as the proposition presented in your letter did not necessarily involve that issue.

Respectfully,

JUDSON HARMON.

The SECRETARY OF AGRICULTURE.

DUTIES—DELIVERY TO IMPORTERS.

After the duty on imported goods which have been deposited in a private bonded warehouse has been paid and a withdrawal permit issued, the Government has no further concern with the goods, and the right to withhold or deliver same rests with the warehouseman alone.

The collector of customs has no authority to interfere or direct the United States storekeeper to interfere in a controversy between the importers and the warehouseman and deliver the goods.

DEPARTMENT OF JUSTICE,

September 28, 1895.

SIR: Yours of September 23 states the following facts:

Importers of whisky deposited it in a private bonded warehouse under the provisions of sections 2961 and 2962, Revised Statutes, taking a negotiable warehouse receipt therefor, which they afterwards pledged to a bank. The importers having afterwards paid the duties, the collector issued to them a withdrawal permit, which they filed with the United States storekeeper in such warehouse, but allowed the whisky to remain, as provided in Revised Statutes, section 2977. While the whisky was so stored, all duties paid, the bank

Duties—Delivery to Importers.

sent the warehouse receipt, indorsed in blank, to the warehouseman, directing him to deliver ten barrels which had been sold by the owner, and to return the receipt after indorsing such delivery thereon. The warehouseman delivered the ten barrels, and claims that he mailed the receipt to the bank with such delivery indorsed thereon, but the bank claims it never arrived. The importers having, with the consent of the bank, sold other portions of the whisky, the warehouseman refuses to deliver unless the importers either produce the warehouse receipt or give a bond of indemnity. The importers have thereupon applied to the collector of customs requesting him to direct the storekeeper to deliver the whisky, in which request the bank has joined.

You ask my opinion whether, in view of these facts, your Department, "having issued the delivery permit, can lawfully direct the delivery of the whisky as requested, in the absence of said warehouse receipt."

When imported goods are deposited in a private bonded warehouse they are in the joint custody of the United States storekeeper and the warehouseman, as expressly provided in Revised Statutes, 2960. The custody of the former is to secure the Government's rights. The custody of the latter is to secure his own. Neither is concerned with the origin or enforcement of the rights of the other, and neither may interfere with the custody of the other. As the custody is joint, action of both custodians is required for delivery. In the case put, all duties having been paid and the delivery permit issued, the Government has no further concern with the whisky, and the right to deliver or withhold delivery rests with the warehouseman alone. The collector of customs has no authority to take any further action in the matter or to interfere or direct the storekeeper to interfere in the controversy between the importers and the warehouseman.

You also refer me to the letter of the collector and that of counsel for the bank, which you inclose, in which attention is called to the hardship resulting to the importers by reason of Revised Statutes, section 934, which forbids the replevin of the whisky. The collector well says: "As a matter of administration, the presence of sheriff's officers in Government warehouses where large quantities of dutiable goods

Seizure of Sealing Vessels—Liability for Wrongful Seizure.

are stored and where the Government's power should be paramount, would lead to constant complication and be a source of danger to the revenue." I beg to say, however, that in the case of a private bonded warehouse, where the custody is joint as above stated, the Government's custody, after all duties are paid and a withdrawal permit is issued, is merely nominal. The right to drawback in case of export, or refunder in case of destruction, to which the collector refers, which are secured by leaving the goods in the warehouse, is waived when the owner demands delivery, and, the goods in that case being really detained by the warehouseman and not by the Government, it is open to question whether section 934 applies. I see no reason why you may not instruct the collector to waive objections to replevin in this instance so that the parties may be free to settle their controversy in the courts. But any question which may arise as to the effect of such waiver can also be there determined.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

SEIZURE OF SEALING VESSELS—LIABILITY FOR WRONGFUL SEIZURE.

British sealing schooners, having on board prohibited and unsealed firearms, together with a large number of seal skins, were seized by American cruisers in Bering Sea and the North Pacific Ocean for alleged violations of the laws for the preservation of fur seals passed in pursuance of the award of the tribunal of arbitration at Paris and delivered to British naval officers, with a written statement of the facts upon which the seizures had been made, but which did not specifically assert that seals had been taken contrary to law, which officers, without in anywise invoking the action of the courts, released them, having reached the conclusion, after investigation and legal advice, that no case could be made out against them. The British Government presented claims for damages on account of such seizures.

Held:

1. That nothing in the British statutes or in the orders and instructions issued for the due execution thereof requires any formal charge by officers making seizures. An indorsement of the grounds upon which they were seized on the certificate of the vessels is required to enable the vessels to proceed to port for trial.

Seizure of Sealing Vessels—Liability for Wrongful Seizure.

2. The mode provided by the Bering Sea award act for dealing with vessels so seized is to subject them to legal proceedings in the British courts. Delivery to the naval authorities in place of the judicial authorities was merely for convenience, and not for the purpose of dispensing with legal proceedings or for a trial by such naval authorities instead.
3. A naval officer to whom delivery is made of a vessel seized under the provisions of the treaty has no authority to investigate the seizure or release the vessel.
4. There being nothing in the acts of either country about liability for wrongful seizures, if such liability exists it is governed by the well-settled principles of law common to both countries relative to such liability.
5. The right to seize, conferred by the acts of both countries, was not limited to vessels caught in the act. In all other cases action must depend upon evidence and indications. In any case where reasonable grounds for the seizure are shown there is no liability for damages on account of such seizure.

DEPARTMENT OF JUSTICE,

October 3, 1895.

SIR: In the matter of the claims presented by the British Government for damages on account of the seizure by United States cruisers of the British sealing schooners *Wanderer* and *Favorite*, I have the honor to give my opinion, as requested by your letter of September 27.

It appears from the letters of the Secretary of the Treasury to yourself, dated June 12 and September 24, which you inclose, that these schooners were seized by American cruisers, one in the North Pacific Ocean June 9, 1894, the other in Bering Sea August 24, 1894, and delivered to British naval officers with a written statement of the facts upon which the seizures had been made, which officers, without in anywise invoking the action of the courts, released them, having reached the conclusion, after investigation and upon legal advice, "that no case could be made out against them."

The British naval officers in releasing the schooners apparently proceeded on the theory that they were invested with the authority of an ordinary examining magistrate or court to determine whether the accused vessels should be subjected to regular judicial inquiry or not. So acting, they seem to have held that the statements of the United States commanders, as well as the facts developed by their own

Seizure of Sealing Vessels—Liability for Wrongful Seizure.

investigation, failed to show even probable cases of violation of the laws for the preservation of the fur seals passed in pursuance of the award of the tribunal of arbitration at Paris under the treaty between the United States and Great Britain concluded at Washington February 29, 1892. (See act of Parliament, April 23, 1894, 57 Vict., chap. 2, 31 L. R. Stat., 4.)

The statements made and delivered by the United States officers were to the effect that prohibited and unsealed firearms, together with large numbers of seal skins, were found on board the seized schooners. In the case of the *Wanderer*, at least, there were other circumstances of suspicion, such as evasion and concealment. The alleged defects in these statements were that they merely set forth as grounds of seizure the facts above stated, but did not specifically assert that seals had actually been taken contrary to law. In other words, considering the statements as pleadings, they set forth mere evidence and not the ultimate fact.

I find nothing in the British statutes, or in the orders and instructions issued for the due execution thereof, which requires any formal charge by officers making seizures. "An indorsement of the grounds on which it was seized" on the certificate of the vessel is required when it is returned, to enable the vessel to proceed to port for trial. (57 Vict., chap. 2, sec. 2 (1).) Section 12 of the act of Congress authorizing seizures of American ships by British officers provides for the delivery with the ship of "any witnesses and proofs on board." (Act approved April 6, 1894, 28 Stat., 52.) The instructions of the Secretary of the Navy to the commander of the United States naval force in Bering Sea, dated May 4, 1894, a copy of which was sent by the Secretary of State to the British minister (Senate Ex. Doc. 67, Fifty-third Congress, third session, p. 124), required the commanding officer making the seizure to draw up a declaration in writing and deliver the same with the vessel, whether such delivery should be made to British or American authorities (*id.*, 126). I have found no similar requirement in the British act, orders in council, or instructions, and the declarations directed by the instructions to American officers were merely intended to carry out section 12 of the

Seizure of Sealing Vessels—Liability for Wrongful Seizure.

act of Congress. These, as well as the indorsement on the certificate above mentioned, were manifestly required, not for the purpose of justifying the seizures to other naval officers to whom delivery might be made, but to indicate evidence for use in the courts, where proper charges would be formulated from the evidence produced. As all seizures are to be made by naval officers and the vessels seized delivered to other naval officers, when not taken direct to the judicial authorities, it could not have been expected that the niceties of legal procedure should be observed in such statements.

The authority of American cruisers to seize British ships is found in the act of Parliament above cited and in the orders in council authorized thereby, which bear date April 30, 1894. Section 1 of such orders provides that American officers may "seize and detain any British vessel which has become liable to be forfeited to Her Majesty under the provisions of the recited act, and may bring her for adjudication before any such British court of admiralty as is referred to in section 103 of 'The merchant shipping act, 1854' (which section is set out in the second schedule to the recited act), or may deliver her to any such British officer as is mentioned in the said section for the purpose of being dealt with pursuant to the recited act."

The mode provided by the Bering Sea award act for dealing with vessels so seized is to subject them to legal proceedings in the British courts (second schedule, section 103). Section 2 of said orders in council, which relates to the conduct of British cruisers seizing American vessels, provided that "such officer, after seizing and detaining a ship of the United States in exercise of the said powers, shall take her for adjudication before a court of the United States having jurisdiction to adjudicate in the matter, or deliver her to any naval or revenue officer or other authorities of the United States." While it is not explicitly stated, it is manifest that the intention was to substitute delivery to the naval authorities of the country to which the vessel belongs in place of delivery to its judicial authorities, merely for convenience and not for the purpose of dispensing with legal proceedings or having a trial by such naval authorities instead. Such delivery is a mere transfer of custody.

Seizure of Sailing Vessels—Liability for Wrongful Seizure.

The law of each country requires that its vessels, when seized by its own cruisers, shall be brought into court for adjudication (second schedule, act of Congress, *supra*, secs. 9 and 11), and intended to give to the cruisers of the other country the same rights given those of its own. (Act of Parliament, 3 (3); act of Congress, sec. 12.)

It may be suggested that the commander of a cruiser conducts an investigation in deciding whether to seize or not to seize, and further, that after seizure he may revoke his decision and release. But two things would prevent the conclusion that a naval officer, to whom delivery is made of a vessel seized under the provisions of the treaty, has power either to review or to investigate anew. One is the spirit of comity shown by the acts of both countries which requires a construction thereof not inconsistent with mutual confidence and respect. The other is that the power of British officers receiving seized vessels from American cruisers is expressly limited to bringing them into court for adjudication. (Orders in council, sec. 1, second schedule, Bering Sea award act, sec. 103.)

Nothing is said in the act of either country about liability for wrongful seizures. If it be conceded, upon principles of comity or otherwise, that such liability was contemplated, it must be assumed that both countries had in mind the well-settled principles of the law common to both relative to such liability.

While the acts of both countries are, of course, directed only against actual cases of unlawful seal fishing, it would be absurd to limit the right of seizure thereby conferred upon each other's cruisers to vessels caught in the act. In all other cases action must depend upon evidence and indications. This was recognized by the authorities of both countries. See instructions of Secretary of the Navy (*supra*, p. 126), which adopts from "Instructions to British cruisers as to seizure" sent by the British minister to the Secretary of State (Senate Ex. Doc., *supra*, 116) the following: "Whether the vessel has been engaged in hunting you must judge from the presence of seal skins or bodies of seals on board, and other circumstances and indications." The possibility of mistakes in such cases is well known. Certainly it could not have been intended by Great Britain to have liability for

Seal Fisheries.

wrongful seizures by American officers depend upon any different rules from those expressly made applicable to seizures by its own. These are merely the rules of the common law in the analogous case of groundless arrest or prosecution by the civil authorities. There is no liability in any case where reasonable grounds for the seizure are shown, even when the court has discharged the vessel. (Second schedule, *supra*, sec. 103.)

The schooners in question, having been seized by due authority, have never been lawfully discharged. It is not even suggested that the American officers who made the seizures did not act in good faith, and they seem to have acted on reasonable grounds of suspicion. My opinion, therefore, is that the Secretary of the Treasury is right in holding that there is no liability for damages on account of such seizures, assuming that there was, in fact, no violation of law by either of the schooners seized. While voluntary release by the seizing officer might dispense with judicial discharge as one of the conditions of liability, this would result only because such release would be an admission of innocence. It will hardly be claimed that the release by British naval officers operated as an admission by the American officers who made the seizure.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF STATE.

SEAL FISHERIES.

Vessels engaged in fur-seal fishing in other waters than those covered by the award of the Paris Tribunal and the act of Congress of April 6, 1894, are not required to be licensed.

DEPARTMENT OF JUSTICE,

October 4, 1895.

SIR: I beg to say in reply to the letter of Acting Secretary W. E. Curtis, of October 3, that I think the construction your Department has placed upon the articles of the award of the Paris Tribunal, and the act of Congress approved April 6, 1894, to give effect thereto, is correct, and that licenses are

Attorney-General—Memorial Hall at West Point.

not required for vessels engaged in fur-seal fishing in other waters than those covered by said award and act. Any doubt which there might be from the sections to which you refer seems to be removed by section 10, which recognizes both licensed and unlicensed vessels.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL—MEMORIAL HALL AT WEST POINT.

The Attorney-General will not give an opinion upon a matter not pending in the administration of a Department.

The Attorney-General will not determine questions of fact.

The method to be followed in selecting granite, marble, and plan and specifications for building a memorial hall at West Point.

DEPARTMENT OF JUSTICE,

October 24, 1895.

SIR: I have the honor to acknowledge the receipt of yours of the 21st instant, in the matter of the advertisement for the erection of a memorial hall at West Point, and to carry out the terms and conditions of the bequest made by Gen. George W. Cullum.

Your first question is as follows:

"I. Is it necessary, under the act referred to, for a definite plan of the building and definite and certain specifications for the same to be absolutely determined upon by the board of trustees and approved by the Secretary of War before the advertising can be legally done?"

My opinion is that, if it would subserve the public interest, the board could adopt a definite plan, certain specifications, and an addendum with specifications certain in character, which may be, at the option of the board, substituted for specifications in the original plan particularly designated, and that, on the approval of said plan, specifications, and addendum by you, bids may be taken, and that then the board can adopt definitely, from the original plans and specifications and substituted specifications, a fixed plan and specifications for the building, and submit them for your approval.

Attorney-General—Memorial Hall at West Point.

II. Inasmuch as you have rejected all of the bids made under the former advertisement, the second, third, and fourth questions submitted by you do not arise in a matter now pending in the administration of your Department, and they are therefore not such questions as can be submitted to the Attorney-General for his opinion.

III. The fifth question is substantially answered in the answer to the first question.

IV. The sixth question is as follows:

"Should a considerable item of the building which is patented and controlled by a single person, firm, or company, and which could be let in a separate contract, be advertised for separate from the rest of the building and let in a separate contract?"

Whether or not this *should* be done involves the determination of questions of fact, in respect of which I can not express an opinion. I am of the opinion, however, that this *could* be done, and that such course would be legal.

V. The seventh question is as follows:

"Is it permissible to defer the selection of the particular kind of granite to be used until after the bids are opened and then select it by the samples presented by the bidders, or must the board, with the approval of the Secretary of War, determine in advance the particular kind of granite to be used; or that it would accept any one of a number of kinds to be named in the advertisement; or that it would accept any granite having color or colors, and other qualities named or described or otherwise designated in the advertisement?"

This also is a mixed question of fact and law. If such procedure would be of any advantage to some bidders over others, it would not be lawful. It occurs to me that the safe way would be to designate certain fixed standards of granite and let each bidder bid upon these separate kinds, with the right to the board to make selection.

I wish to call your attention to what seems to me to be an erroneous opinion on your part.

On page 6 of your communication is the following:

That the granite "is to be of the best quality of pink Milford, or other light-colored granite equally satisfactory to the architects and the board of trustees," and that the marble

Pardon.

should "be from either the Tuckahoe, Vermont, Lee, or Beaver Dam quarries, or *other white marble* equally satisfactory to the architect and the board of trustees."

You proceed upon the assumption that this language gives to the Government the right to select any other light-colored granite, or any white marble other than those specified, equally satisfactory to the architect and board of trustees. In my opinion, you would have a right to demand pink Milford granite or marble of the kinds designated, and if others than these should be tendered by the contractor as a substitute you could accept them; but I do not think you would have the right to demand any light-colored granite or any white marble other than those named.

I return herewith the papers sent with your letter.

Respectfully,

JUDSON HARMON.

The SECRETARY OF WAR.

PARDON.

Inasmuch as in some of the States a person convicted of an offense which the laws of the United States call a misdemeanor loses his right to vote, sit as juror, etc., if the action of the President on an application for a pardon depends simply on the question of necessity for pardon, such necessity exists, unless the applicant is to be prevented from freely changing his residence under penalty of losing his rights of citizenship thereby.

DEPARTMENT OF JUSTICE,

October 31, 1895.

SIR: I have investigated the question of the necessity of a pardon in the case of Jacob Warren which you referred to me yesterday in connection with a letter from Judge Sage, of the United States court for the southern district of Ohio, and beg to report as follows:

It is probably true that, owing to the language of the constitution and laws of Ohio, Jacob Warren would not lose his right to vote, sit as juror, etc., by reason of his conviction for an offense which the laws of the United States call a misdemeanor. In some other States, however, such loss of rights would result. I have not examined them all, but

Duties.

this is true of Alabama, California, and Connecticut. If the case, therefore, be one in which your action on the application for pardon depends simply on the question of necessity for pardon, I should say that the necessity exists, unless Warren is to be prevented from freely changing his residence under penalty of losing his rights of citizenship thereby.

Very respectfully,

JUDSON HARMON.

The PRESIDENT.

DUTIES.

Dutiable articles purchased by the United States from the importers while in bond remain dutiable, and the duties must be paid before delivery.

DEPARTMENT OF JUSTICE,

November 2, 1895.

SIR: I have the honor to acknowledge your communication of October 25, asking an official opinion with relation to a recent purchase made by the Supervising Surgeon-General of the Marine-Hospital Service, who is an officer of your Department. It appears that he purchased certain goods for the use of that Service, after advertisement for proposals, and that the proposals specified that the price named was for the article "in bond." He now asks you to authorize the collector of customs to allow these goods to be delivered to him free of duty. They are goods which under ordinary circumstances would be dutiable. You ask whether you can lawfully give the authorization requested.

The free list in the tariff act of July 14, 1870, chapter 255, contained the following paragraph:

"Articles imported for the use of the United States: *Provided*, That the price of the same did not include the duty."

This provision remained in force until the tariff act of October 1, 1890, when it was entirely omitted. It was restored by the tariff act of August 27, 1894, chapter 349, but with a material change of form. It now appears in the free list as paragraph 385, as follows: "Articles imported by the United States."

The answer to your question depends upon this clause, because the articles in question are not included among

Public Works—Contracts.

those enumerated in the only other clause in the free list of the present act relating to things for Government use, viz, paragraph 412:

“Books, engravings, photographs, etchings, bound or unbound, maps and charts, imported by the authority or for the use of the United States or for the use of the Library of Congress.”

This was also in the act of 1890, paragraph 514, and that of June 6, 1872, chapter 315. My opinion is that the present clause in the free list applies only to articles which are purchased by the Government in foreign markets and imported for its own use. You therefore can not lawfully give the desired authorization. This seems to dispose of the case before you and to avoid the necessity of considering the other questions in your letter.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

PUBLIC WORKS—CONTRACTS.

After an appropriation is exhausted, a contract not for the completion of any specific work, as the erection of a building, the construction of a road, or rendering a channel adequate for the passage of vessels of a certain draft, is at an end. Work done after the appropriation is exhausted would not come within such a contract. Executive officers are prohibited by sections 3679, 3732, 3733, and 5503, Revised Statutes, from continuing the employment of the contractors. If further appropriations are made, there must be a new contract for their expenditure.

DEPARTMENT OF JUSTICE,

November 4, 1895.

SIR: I have the honor to acknowledge the receipt of your communication of October 14, with its inclosures, referring to the contract of October 10, 1892, between Maj. A. N. Damrell, Corps of Engineers, United States Army, of the first part, and National Dredging Company of the second part, and you submit for my opinion the following questions:

“1. Does the work which the National Dredging Company propose to do come within their contract?

“2. If the work is within the contract, can the Secretary of War supervise the same as required by the contract

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without waiting for further appropriation to be made by Congress?"

It appears from your letter that—

"The National Dredging Company has notified the Secretary of War that it elects to carry on the work of dredging in the Mobile Harbor, at Mobile, Ala., under its contract hereinafter referred to, without waiting for an appropriation to be made by Congress to pay for the same, and respectfully asks the Secretary to supervise the same."

It appears from the contract—

"That the party of the second part shall excavate, remove, and deposit, in accordance with specifications hereunto attached, 17,000,000 cubic yards, more or less, of material from Choctaw Pass (commencing at the intersection of the channel by a line parallel to Maryland street, halfway between Texas and Maryland streets) and the channel below down to the 23-foot curve in the bay.

"That the party of the first part shall pay to the party of the second part for such excavating, removing, and depositing the sum of 7.7 cents per cubic yard."

The legislation by Congress on the subject of this improvement is as follows:

Act of June 18, 1878 (20 Stat., 152, chap. 264): "For the improvement of Mobile Harbor, \$10,000, to be applied to making tests, surveys, and borings to determine whether the ship channel now leading from the lower anchorage in Mobile Bay can be deepened so as to admit vessels drawing 22 feet, or any less draft above 13 feet, to the wharves at the city of Mobile."

Act of March 3, 1879 (20 Stat., 370): "For improving Mobile Harbor, to secure a 17-foot channel, one hundred thousand dollars."

Act of June 14, 1880 (21 Stat., 181): "Improving harbor at Mobile, Alabama: Continuing improvement, one hundred and twenty-five thousand dollars."

Act of March 3, 1881 (21 Stat., 470): "Improving harbor at Mobile, Alabama, one hundred thousand dollars."

Act of August 2, 1882 (22 Stat., 194): "Improving harbor and river of Mobile, Alabama: Continuing improvement, one hundred and twenty-five thousand dollars."

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Act of July 5, 1884 (23 Stat., 135): "Improving harbor and river at Mobile, Alabama: Continuing improvement, two hundred thousand dollars."

Act of August 5, 1886 (24 Stat., 314): "Improving harbor at Mobile, Alabama: Continuing improvement, ninety thousand dollars."

Act of August 11, 1888 (25 Stat., 404): "Improving harbor at Mobile, Alabama. Continuing improvement on enlarged project for securing a channel twenty-three feet deep and two hundred and eighty feet wide, two hundred and fifty thousand dollars."

Act of September 19, 1890 (26 Stat., 431): "Improving harbor at Mobile, Alabama, up to the mouth of Chickasabogue Creek. Continuing improvement, three hundred and fifty thousand dollars."

Act of July 13, 1892 (27 Stat., 92): "Improving harbor at Mobile, Alabama. Continuing improvement, two hundred and twelve thousand five hundred dollars. *Provided*, That contracts may be entered into by the Secretary of War for such materials and work as may be necessary to complete the present project of improvement, to be paid for as appropriations may from time to time be made by law; not to exceed in the aggregate one million one hundred and eighty-one thousand three hundred dollars, exclusive of the amount herein and heretofore appropriated."

Act of March 3, 1893 (27 Stat., 603): "For improving harbor at Mobile, Alabama. Continuing improvement, five hundred thousand dollars."

Act of August 18, 1894 (28 Stat., 342): "Harbor at Mobile, Alabama. The Secretary of War shall cause a survey to be made to ascertain the cost of widening the channel of said harbor now in course of improvement, to obtain a width of one hundred feet at the bottom, with a proper slope therefor, and also a survey to ascertain the best point for and the cost of a sufficient channel between Mobile Bay and the Mississippi Sound for the proper accommodation of commerce; and the expenses of said two surveys shall be paid out of any appropriation made for the improvement of the channel of Mobile Harbor.

"The Secretary of War is authorized, at his discretion, to use not exceeding ten thousand dollars of the amount appro-

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appropriated for the improvement of Mobile Harbor in keeping the channel clear of timber, logs, and other obstructions.”

Act of August 18, 1894 (28 Stat., 404): “For improving harbor at Mobile, Alabama. Continuing improvement, three hundred and ninety thousand dollars.”

Act of March 2, 1895 (28 Stat., 947): “For improving harbor at Mobile, Alabama. Completing improvement, two hundred and ninety-one thousand three hundred dollars.”

It will be observed from this course of legislation that the first appropriation of June 18, 1878, was to ascertain whether the improvement then proposed was practicable and that the appropriations from that date to August 11, 1888, were for the purpose of constructing the improvement as then projected.

The appropriation of August 11, 1888, was for “continuing improvement on enlarged project for securing a channel 23 feet deep and 80 feet wide.”

On July 13, 1892, there was appropriated the sum of \$212,500, with the proviso:

“That contracts may be entered into by the Secretary of War for such materials and work as may be necessary to complete the present project of improvement, to be paid for as appropriations may from time to time be made by law; not to exceed in the aggregate one million one hundred and eighty-one thousand three hundred dollars, exclusive of the amount herein and heretofore appropriated.”

The amounts thereafter appropriated were as follows:

March 3, 1893	\$500,000
August 18, 1894	390,000
March 2, 1895	291,300
Making in the aggregate.....	1,181,300

which was the limit prescribed by the act of July 13, 1892.

By section 3679, Revised Statutes, it is provided: “No Department of the Government shall expend in any one fiscal year any sum in excess of appropriations made by Congress for the fiscal year; or involve the Government for the future payment of money in excess of such appropriations.”

By section 3732, Revised Statutes: “No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation

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adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year."

By section 3733, Revised Statutes: "No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which binds the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."

Section 5503: "Every officer of the Government who knowingly contracts, for the erection, repair, or furnishing of any public building, or for any public improvement, to pay a larger amount than the specific sum appropriated for such purpose shall be punished by imprisonment not less than six months, nor more than two years, and shall pay a fine of two thousand dollars."

The object of these provisions of the statute was, it is manifest, to prevent executive officers from involving the Government in expenditures or liabilities beyond those contemplated and authorized by the lawmaking power.

In *Shipman v. United States* (18 C. Cls. R., 146) that court said:

"The liability in this case rests wholly upon the appropriation, and is different from those cases which frequently arise wherein Congress passes an act authorizing officers to construct a building or do other specified work, without restriction as to cost, and then makes an appropriation inadequate to do the whole of it or makes none at all.

"In such cases the authority to cause the work to be done and to make contracts therefor is complete and unrestricted. All work, therefore, done under the direction of the officers thus charged with the execution of the law creates a liability on the part of the Government to pay for it, and if a written contract be made and work be done in excess of the contract specifications, or entirely outside of or in addition to the written contract, and such work inures to the benefit of the United States in the execution of the law, or is accepted by the proper public officers, a promise to pay its reasonable value is implied and enforced.

Public Works—Contracts.

“Authority to contract for the completion of an entire structure, the plan of which has been determined on, can not be inferred from the mere fact that an appropriation of a certain sum to be expended on the structure has been made. Hence, a contract, though it might be good to the extent of such appropriation, could not be made to affix itself to future appropriations and control their expenditure. A contract of this character would be in violation of the spirit of section 3733, Revised Statutes, if not of its express terms.” (15 Opin. Att’y-Gen., 236.)

“After an appropriation is exhausted the contract is at an end. If further appropriations are made there must be a new contract for their expenditure.” (9 Opin., 18.)

It is plain that the contract here is not for the completion of any specific work, as the erection of a building, the construction of a road, or rendering a channel adequate for the passage of vessels of a certain draft.

It is, by its very terms, for the excavation, removal, and deposit, in accordance with certain specifications, of 17,000,000 cubic yards, more or less, of material, within certain prescribed limits.

The result anticipated by the engineer officers from such removal may wholly fail. The removal of the mass may prove to be a total loss to the Government; and yet the contractor, not having contracted to produce any certain results by such removal, would be entitled to the full consideration contracted for.

Indeed, it appears from the letter of October 8, 1895, from the Acting Chief of Engineers, accompanying your communication, that to carry out fully the object for which the aggregate appropriations of \$1,181,300 were made, it was found necessary to contract with another dredging company, to wit, the Rittenhouse-Moore Dredging Company, to excavate, remove, and deposit material from another section of the channel in Mobile Harbor; and that officer quotes from the official report of Maj. A. N. Damrell, of the Corps of Engineers, as follows:

“It is, however, estimated that the amount of work in the bay (Choctaw Pass) would be about 17,000,000 yards; and that amount was placed in the wording of the contract, and

Public Works—Contracts.

the words 'more or less' were added to cover this uncertainty. Since then it has been found that the amount necessary to complete the bay part of the project is about 16,000,000 yards."

I think, then, the true construction of the contract as to the work to be performed by the contractors is that they were to excavate from Choctaw Pass, within the limits defined in the contract, material, 17,000,000 cubic yards, more or less.

The contract was made October 10, 1892, and evidently on the basis and in full view of the act of July 13, 1892, which prescribed \$1,181,300 as the limit of the amount to be expended on the entire project.

It appears from your letter and the accompanying papers that the amount has now been appropriated and expended.

I am of opinion on the whole case, as presented, that the contract of 10th of October, 1892, has been fully performed, and that you are without authority to continue the employment of these contractors on the work under that contract. That the work which they propose to do does not "come within their contract." That you can not, through the engineer officers of the Army, continue any supervision of the work of which the National Dredging Company may hereafter perform, or extend to that company any recognition as a continuing contractor with the Government without exposing the Government to the liability of an implied contract.

Very respectfully,

HOLMES CONRAD,
Acting Attorney-General.

The SECRETARY OF WAR.

Duties.

DUTIES.

Prior to the customs administration act duties collected by mistake of law could not be returned after one year from the time of entry in the absence of a protest by the importer under Revised Statutes, section 2931.

Opinion of September 21, 1895 (21 Opin., 224), reaffirmed that duties paid by mistake can now be refunded only (1) when duties provisionally paid are reduced upon the final liquidation; (2) for mere clerical error; (3) for mutual mistake of fact.

DEPARTMENT OF JUSTICE,

November 8, 1895.

SIR: I have the honor to acknowledge your communication of October 31, asking my official opinion as to whether the decision of the United States district court for the eastern district of Pennsylvania in the suit of the *United States v. Alfred Earnshaw* requires or authorizes you to refund to said Earnshaw certain moneys claimed by him as customs duties unlawfully exacted. If I understand the facts aright, certain goods were imported by Earnshaw in 1881, and the duties thereon, as provisionally estimated by the collector, were paid by him and the goods received. Subsequently the collector liquidated the entry by raising the amount of duties on the goods, thus leaving a balance due the United States, for which an action was brought. Upon the trial of this action a special verdict was rendered, upon which the court directed judgment for the defendant, holding the collector's liquidation to be erroneous. The United States acquiesced in this decision. Hence, I assume, for present purposes, the duty properly payable by Earnshaw was less than the amount actually paid by him to the collector, and therefore, had he taken proper steps to protect his rights, he could have sued the collector for a balance of \$291.60, and recovered this amount for him in an action at law, or he could properly have applied to your Department for a refund.

He, however, failed to protest against the collector's decision as required by section 2931 of the Revised Statutes, and for this reason the collector's decision was "final and conclusive" against him. The decision of the court was, therefore, clearly erroneous. (*Westray v. United States*, 18 Wall.,

Duties.

322; *Merritt v. Cameron*, 137 U. S., 542.) Whatever dispensing power the Secretary of the Treasury may have had under section 3013 of the Revised Statutes expired after the lapse of one year from the time of entry under section 21 of the antimoieties act of June 22, 1874, chapter 391. Nor has your power in the premises been increased by subsequent legislation. Your power to refund in the absence of a proper protest has recently been the subject of careful consideration by Acting Attorney-General Conrad in an opinion rendered to you September 21, 1895, and he shows that the cases in which you can thus refund are the following only: First, when duties provisionally paid are reduced upon the final liquidation; second, for mere clerical error; third, for mutual mistake of fact. You have now no right to refund, in the absence of proper protest, either for mistake of law or for any mistake of fact which is not mutual. Your statutory powers were not enlarged by acquiescence in the erroneous decision aforesaid, nor was your power to refund involved at all in that decision.

For these reasons you were advised by the then Acting Attorney-General, on August 7 last, that the decision in Mr. Earnshaw's case "does not carry with it the obligation of your Department to repay to him any part of the amounts paid or deposited by him at the time of entry of his goods, he having failed to protest at the time." You now inform me that the custom-house brokers representing Mr. Earnshaw have addressed you, arguing against the correctness of that decision, and that you thereafter referred the matter to the Solicitor of the Treasury, who expressed the opinion that the points raised by the brokers were well taken. You therefore return me the papers and ask me to review the opinion of the Acting Attorney-General. I have done so, and believe it to be correct, and therefore advise you that you have no power to make the refund desired.

The opinion of the Solicitor of the Treasury appears to be based upon the first clause of the act of March 3, 1875, chapter 136, section 1. That clause appears to be restrictive and not enabling, so that whatever power to refund belongs to the Secretary of the Treasury must be found elsewhere.

 Statutory Construction—World's Fair—Medals.

But however this may be, that clause can not affect the present question, because the Solicitor is mistaken in presuming that the Attorney-General decided that no writ of error would be taken by the United States in the action of *United States v. Earnshaw*. The case appears never to have been reported to the Attorney-General. The district attorney's acquiescence in the decision was upon the advice of the then Secretary of the Treasury.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

STATUTORY CONSTRUCTION—WORLD'S FAIR—MEDALS.

So much of section 3 of the act of August 5, 1892, as provides for the duplication of medals at the mints of the United States was repealed by the act of March 3, 1893.

The express object of a later act being to amend an earlier act, a feature of the earlier act which was omitted from the later act was necessarily repealed.

DEPARTMENT OF JUSTICE,

November 11, 1895.

SIR: Your letter of November 4 submits for my opinion the question whether section 3 of the act of Congress approved August 5, 1892 (27 Stat., 389), which provides—

"That fifty thousand bronze medals and the necessary dies therefor, with appropriate devices, emblems, and inscriptions commemorative of said Exposition celebrating the four hundredth anniversary of the discovery of America by Christopher Columbus, shall be prepared under the direction of the Secretary of the Treasury, * * * and authority may be granted by the Secretary of the Treasury to the holder of a medal properly awarded to him to have duplicates thereof made at any of the mints of the United States from gold, or silver, or bronze at the expense of the person desiring the same," is repealed by act of March 3, 1893 (27 Stat., 587).

The act of March 3, 1893, is in express terms an amendment of the corresponding section 3 of the act of August 5, 1892; and these two sections are manifestly identical, except

Statutory Construction—World's Fair—Medals.

as to the provision in the act of August 5, 1892, authorizing the holder of a medal to have duplicates thereof made at his own expense at any of the mints of the United States from gold, silver, or bronze, which is omitted from the act of March 3, 1893.

In *Tracy v. Tuffy* (134 U. S., 223), the court said:

“And while it is true that repeals by implication are not favored by the courts, it is settled that without express words of repeal a previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both and to prescribe the only rules in respect to that subject that are to govern.”

Here the express object of the statute of 1893 is to amend a specific section of the act of 1892. A comparison of the section in the two acts shows very plainly wherein the earlier act was amended by the later. It would be an excess of refinement to enter upon an argument to show that the feature of the earlier act, which was omitted from the later act, was necessarily repealed.

“Where two acts are repugnant in any of their provisions, the later act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first.” (*District Columbia v. Hutton*, 143 U. S., 18.)

I am, therefore, of the opinion that so much of section 3 of the act of Congress approved August 5, 1892, as provides for the duplication of medals at the mints of the United States in gold, silver, or bronze was repealed by the act of March 3, 1893.

HOLMES CONRAD,
Solicitor-General.

Approved.

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

Custom-House Brokers—Drawbacks—Attorney-General.

CUSTOM-HOUSE BROKERS—DRAWBACKS—ATTORNEY-GENERAL.

The word "broker" has now no definite legal signification.

The term "custom-house broker" in section 23 of the tariff act of 1894 includes persons dealing in drawback matters exclusively. Such a broker, when his license has been revoked, can not thereafter deal directly with the customs officials, except when acting for themselves as principals.

Drawback moneys are duties repaid to the importer or the person to whom he has transferred his rights.

The existence of a usage is a question of fact, of which the Attorney-General can not take notice unless officially informed.

The Attorney-General can not give an official opinion upon the construction of customs regulations which may be modified at any time by the Secretary of the Treasury.

In construing the main provisions of a statute too great weight should not be put upon exceptions and provisos which may have been inserted from excess of caution.

DEPARTMENT OF JUSTICE,

November 14, 1895.

SIR: Your communication of October 18, asking my official opinion upon the question raised by Messrs. Des Brisay and Allen, has received very careful consideration, counsel have been heard on behalf of the parties interested, and inquiry has been made as far as possible into the custom-house practice in this and analogous cases. For these reasons the answer to your inquiry has been delayed.

The question arises upon the construction of sections 22 and 23 of the tariff act of August 27, 1894. Section 22 relates to drawbacks allowable upon exportation of articles made wholly or in part from imported materials. The section provides for the identification of the imported materials and completed articles and the ascertainment of the facts necessary to enable the duties which have been paid thereon to be estimated. It then proceeds as follows:

"The drawback due thereon shall be paid to the manufacturer, producer, or exporter, to the agent of either, or to the person to whom such manufacturer, producer, exporter, or agent shall in writing order such drawback paid, under such regulations as the Secretary of the Treasury shall prescribe."

Custom-House Brokers—Drawbacks—Attorney-General.

Section 23 of the act is as follows :

“That the collector or chief officer of the customs at any port of entry or delivery shall issue a license to any reputable and competent person desiring to transact business as a custom-house broker. Such license shall be granted for a period of one year, and may be revoked for cause at any time by the Secretary of the Treasury. From and after the first day of August, eighteen hundred and ninety-four, no person shall transact business as a custom-house broker without a license granted in accordance with this provision; but this act shall not be so construed as to prohibit any importer from transacting business at a custom-house pertaining to his own importations.”

Messrs. Des Brisay and Allen were licensed custom-house brokers, but on account of certain alleged irregularities practiced by them, renewal of their license was refused. Although they are thus forbidden to do business as custom-house brokers, they nevertheless claim the right to receive payment of drawback as “agents” under section 22. Your inquiry is, whether a person in their position “can legally transact business at the custom-house as agent for other persons.”

The first point to be settled is the definition of the phrase “custom-house broker” in section 23. This phrase has not as yet been legally defined. Its proper legal definition must therefore now be found. Counsel for the disbarred firm claim that it has acquired by usage a settled technical definition, and that this definition does not include persons dealing with the custom-house in relation to claims for drawback, nor does it include persons who do business in their own names. Evidence of this kind I can not consider. Nothing is better settled than that the existence of a usage affecting the legal definition of a statutory term is a question of fact, not of law. Upon the trial of an action at law it would be left to the jury. Being a question of fact, I can not pass upon it. (21 Opin., 180.) As you give me no official information of any such custom I assume that there is none, and that the question must be settled by applying the legal principles of construction to the language of the act of 1894.

Although the latest editions of the standard dictionaries contain definitions of the phrase “custom-house broker,” I

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do not think that these definitions are sufficiently well settled or definite in their limitations to dispose of the present question.

Nor is the word "broker" used with sufficient precision for this purpose. According to the Century Dictionary, it includes anyone "who attends to the doing of something for another." Webster's first definition is "one who transacts business for another; an agent." Originally the term had a much more definite meaning than at present. It was confined to persons negotiating sales who had no possession of the goods sold and who did not act in their own name. These limitations are not now recognized. It is only necessary to refer to the familiar cases of stock brokers, real-estate brokers, and insurance brokers.

From the necessities of business at large centers transactions between private parties and custom-house officials must mainly be done through agents. These agents, when devoting themselves wholly or mainly to that branch of work, are generally known as custom-house brokers. The main work of the customs officials is, of course, to collect moneys due the Government by way of impost duties. A considerable incident to their work, however, is the repayment of moneys which have thus been paid in. Such moneys may happen to be repaid because of mistakes in the original estimate, or by way of drawback. All of this business is done at the custom-house. All of it may be negotiated by custom-house brokers. Whether the middleman's negotiation concerns the amount of duties to be paid by the importer, or the amount to be repaid either to him or to the assignee of his rights, the negotiation relates to custom-house work, and is in the nature of a broker's business. Drawback moneys are duties. They are a repayment to the importer, or the person to whom he has transferred his rights, of a part of the duties which have been paid by him upon receiving his goods, (Rev. Stat., secs. 3015, 3038, 3040, 3041; tariff act of 1894. sec. 22.)

Hence, in my opinion, the term "custom-house broker" includes persons who deal in drawback matters exclusively as well as those who (like Des Brisay and Allen) combine all branches of custom-house work. The phrase, therefore,

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includes some of the persons mentioned in the final clause of section 22, which section governs. Are, then, the class of agents referred to in section 22 excepted from the necessity of obtaining official recognition of their reputability and competence, or are they subject to the same regulations as other agents who do business at the custom-house? I think that the object of Congress in adopting section 23 was to protect the whole custom-house, the drawback department included, from the risks and annoyances of dealing with improper persons. It is, therefore, my opinion that section 22 is to be construed as subject to an implied proviso, that persons actually transacting business with the Government, when acting as brokers for others and not as principals themselves, must be persons officially recognized by the chief officer of the customs as reputable and competent.

It will be noticed that every agent referred to in section 22 need not necessarily be a licensed custom-house broker. Authority to collect drawback may, for instance, be delegated by an inland manufacturer to his general selling agent in New York, or to some attorney at law; but the person so authorized must conduct his business at the custom-house through some licensed broker, unless he prefers to obtain, himself, for the occasion, a license, which, if he is a reputable and competent person, the collector is obliged by the law to give him. It has been suggested, indeed, that it would be unreasonable to require a license for a single transaction. This formality, however, need not be made oppressive; while, on the other hand, to admit such exceptions to the general language of section 23 might give rise to abuses. An attorney at law admitted to practice in the courts of one State occasionally wishes to argue in another. If he have but a single case, however, he must obtain special leave of the court to appear. I think that Congress intended, for the protection of importers, exporters, and manufacturers, and of the Government itself, to subject the business of custom-house broking to restrictions somewhat similar to those which courts have imposed upon practice at the bar.

I have not overlooked the last clause of section 23, which provides that it shall not be so construed "as to prohibit any

Custom-House Brokers—Drawbacks—Attorney-General.

importer from transacting business at a custom-house pertaining to his own *importations*." It is argued that this clause shows the whole section to be intended to apply only to importations and not to exportations. Care must always be had not to put too great weight upon such exceptions and provisos. They are apt to be thrown in upon a Congressional debate or in committee without full appreciation of the scope of the section under consideration, but in order to protect some particular class of persons from any possibility of embarrassment. This clause is entirely unnecessary, for an importer transacting business pertaining to his own importations is not acting as an agent and therefore not acting as a broker. I do not think that the insertion of this unnecessary exception in the statute indicates an intent to exclude drawbacks from its scope.

Hence, it is my opinion that Des Brisay and Allen may collect, through the medium of licensed custom-house brokers, any moneys due them as agents for others; that they may have complete access to the custom-house whenever they are acting for themselves as principals; but that they can not deal directly with the customs officials in any other case.

You ask me a further question which seems to involve the construction or application of one of the Customs Regulations of 1892. These are regulations formulated by your predecessor, and which you have the power to modify at any time. For these reasons their construction is not a proper subject of an opinion by the Attorney-General. (18 Opin., 521; 20 Opin., 649, 652.) Probably the principles hereinabove laid down will enable you to solve this question without further assistance from me.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

Attorney-General—Trade-marks.

ATTORNEY-GENERAL—TRADE-MARKS.

Whether one trade-mark simulates another is a question of fact upon which the Attorney-General can not give an official opinion.

A foreigner who has simulated the trade-mark of a domestic manufacturer can not obtain the right to import his goods into this country merely by recording his fraudulent trade-mark under section 6 of the tariff act of 1894 before the latter has taken the steps necessary to protect himself.

DEPARTMENT OF JUSTICE,
November 23, 1895.

SIR: I have the honor to acknowledge your communication of November 20, asking an official opinion with relation to the construction of section 6 of the act of August 27, 1894, which provides—

“That no article of imported merchandise which shall copy or simulate the name or trade-mark of any domestic manufacture or manufacturer shall be admitted to entry at any custom-house of the United States.”

The section further provides for registry, on books in your Department, by “any domestic manufacturer who has adopted trade-marks,” to aid in carrying out the purposes of the statute.

It appears from your letter that the agents of a foreign manufacturer have registered an alleged trade-mark which is claimed to be a simulation of the trade-mark of a domestic manufacturer. Three days later the domestic manufacturer registered his own trade-mark.

You ask me whether one of these is a simulation of the other. This presents a question of fact which I am not authorized to answer. (20 Opin., 698; 21 Opin., 135; *Erhardt v. Steinkhardt*, 153 U. S., 177.)

Answering your second question, I advise you that the fact that the foreign trade-mark was the one first filed in your Department has no bearing upon the question. A foreigner can not obtain the right to send fraudulently marked goods into the country merely by recording his fraudulent mark in your Department before the domestic manufacturer, whose goods are to be simulated, has taken the steps necessary to protect them.

Civil Service Commission.

Your third question does not seem to be one presently arising in the administration of your Department.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

CIVIL SERVICE COMMISSION.

Draftsmen temporarily employed by the Secretary of the Treasury under the act of March 2, 1895, chapter 189, may be appointed without certification from the Civil Service Commission.

DEPARTMENT OF JUSTICE,

November 25, 1895.

SIR: I have the honor to acknowledge your communication of November 20, asking an official opinion whether you have the authority to make appointments, without certification from the Civil Service Commission, of the persons to be employed by you under the following provision of the sundry civil appropriation act of March 2, 1895, chapter 189 (28 Stat., 911), relating to the proposed new Government building at Chicago:

"The sum of thirty thousand dollars is hereby authorized to be expended by the Secretary of the Treasury to employ temporarily draftsmen and skilled service, which may be necessary in the preparation of plans and specifications for the said building, this sum to be exclusive of any moneys that he may be authorized to expend for the services of engineers, draftsmen, and other persons employed in the preparation of plans and specifications for any other public buildings."

Your authority to appoint persons employed is not conditioned upon certification of eligibles by the Civil Service Commission except in the cases provided for by the rules which the President has made under the act of January 16, 1883, chapter 27. It is my opinion that these rules do not apply to appointments under the statute above cited.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

Board of General Appraisers.

BOARD OF GENERAL APPRAISERS.

The Board of General Appraisers has jurisdiction to decide whether cartage charges made by a collector of customs are proper.

DEPARTMENT OF JUSTICE,
November 26, 1895.

SIR: I have the honor to acknowledge your communication of November 21, asking an official opinion as to the protest of R. Helwig with regard to cartage charges. It appears that certain goods imported by Mr. Helwig were carted to a warehouse, under the provisions of section 2926 of the Revised Statutes, on account of defective entry. The carting was done by draymen duly hired according to the provisions of the antimoiety act of June 22, 1874, section 25. The collector has paid the draymen at the regular contract rate, yet the importer protests, claiming it to be an overcharge. You ask whether this is a case of which the Board of General Appraisers have jurisdiction under section 14 of the customs administrative act of June 10, 1890.

This is a case which under the former practice would have been a proper subject for an action against the collector under Revised Statutes, section 3011. For an example of such action see *Kennedy v. Magone* (158 U. S., 212). That action has been abolished, and I think that section 14 of the customs administrative act provides a substitute therefor which is applicable in the present instance, for it gives to the Board of General Appraisers jurisdiction to review the collector's decisions not only as to the "duties chargeable upon imported merchandise, including all dutiable costs and charges," but also "as to all fees and exactions of whatever character (except duties on tonnage)." Your question is therefore answered in the affirmative.

While holding that the Board of General Appraisers have jurisdiction, I do not express an opinion as to whether or not the Board would be bound by the rates fixed in the contract with the draymen.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

Witness Fees.

WITNESS FEES.

A Department clerk when subpoenaed to testify on behalf of the United States has no right to witness fees, but his expenses are allowable. When subpoenaed by a private party he may demand and accept witness fees.

DEPARTMENT OF JUSTICE,

November 26, 1895.

SIR: Answering your communication of November 22, with relation to the case of Mr. Stewart, I have the honor to say that in my opinion he has no right to witness fees when subpoenaed in behalf of the Government. (Rev. Stat., sec. 850.) In that case his necessary expenses, including the expense incident to the production of records for the court when he is served with a subpoena *duces tecum*, are allowable. When subpoenaed on behalf of a private party I am not aware of any rule of law which would prevent his demanding and accepting witness fees. If the legal fees should not be sufficient to pay him for the expenses incident to producing the records before the court, I presume that the persons at whose expense he is subpoenaed would willingly pay the difference if you should call upon them to do so.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

WITNESS FEES.

Same as above.

DEPARTMENT OF JUSTICE,

November 26, 1895.

SIR: Answering your communication of November 22, with relation to the case of Mr. Stewart, I have the honor to say that in my opinion he has no right to witness fees when subpoenaed in behalf of the Government. (Rev. Stat., sec. 850.) In that case his necessary expenses, including the expense incident to the production of records for the court when he is served with a subpoena *duces tecum*, are allowable. When subpoenaed on behalf of a private party I am not aware of any rule of law which would prevent his demanding and

Compromise—Attorney-General.

accepting witness fees. If the legal fees should not be sufficient to pay him for the expenses incident to producing the records before the court, I presume that the persons at whose expense he is subpoenaed would willingly pay the difference if you should call upon them to do so.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF WAR.

COMPROMISE—ATTORNEY-GENERAL.

The Secretary of the Treasury has no power to compromise or release a judgment in favor of the United States from which there is no appeal and of whose collectibility in full there is no doubt.

A claim once fully considered and held unlawful by one Attorney-General can not, with propriety, be reconsidered by his successor, at least except in some extraordinary case.

There is a clear distinction between the compromise of a doubtful case and the remission of a penalty, forfeiture, or disability.

DEPARTMENT OF JUSTICE,

November 27, 1895.

SIR: Your communication of November 25, asking my official opinion in the matter of the petition of the International Cotton Press Company of New Orleans, has received my careful attention.

The facts of this case are, in main, well known to this Department. One Snyder, a tobacco manufacturer, was indebted to the United States in the amount of several thousand dollars under the internal-revenue laws, and the claim of the United States, on or about November 20, 1879, became a lien upon his property by virtue of sections 3186 and 3371 of the Revised Statutes. On February 5, 1881, he sold certain real property to the petitioner, failing to disclose the fact that there was a lien thereon; and it was purchased without knowledge of such lien. The United States has obtained a decree against the petitioner, under which it is entitled to sell this real estate in satisfaction of its claim. This decree has received the sanction of the highest court (*United States v. Snyder*, 149 U. S., 210), and is not appealable. It is not claimed that there is any doubt of the ability

Compromise—Attorney-General.

of the United States to realize the amount due by a sale of the property. It is claimed that the decree established a new rule of law; but, in fact, it was merely a new application of very familiar and elementary principles.

The petitioner seeks to be relieved from this adjudged lien on its property on the ground of hardship, because, being protected by no recording act, it bought in ignorance of the Government's claim. This is a hardship shared with all persons who, without sufficient inquiry, buy property subject to claims which the law does not require to be recorded, such as dower rights in estates. The petitioner also claims that the full amount could have been collected from Snyder if the Government had proceeded promptly against him individually instead of relying (as it had a right to do) upon its lien on his property; and that Snyder has since become insolvent, so that, if petitioner's land were sold, it could have no recourse against him.

Upon taking up this claim for consideration you were confronted with the question, whether it is within your power to release, in whole or in part, a judgment recovered by the United States, from which there is no appeal and of whose collectibility in full there is no doubt. The petitioner claims that you have jurisdiction under section 3469 of the Revised Statutes, which is as follows:

"Upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the Solicitor of the Treasury, the Secretary of the Treasury is authorized to compromise such claim accordingly. But the provisions of this section shall not apply to any claim arising under the postal laws."

This question was referred by you to my predecessor in office in 1894; and it was referred in connection with this very claim of the International Cotton Press Company and upon the same statement of facts. It was carefully considered by this Department, and an opinion rendered by Solicitor General Maxwell, which opinion was approved by

Compromise—Attorney-General.

Attorney-General Olney. Their conclusions are stated as follows (21 Opin., 51):

"The section does not authorize the Secretary of the Treasury to remit or release moneys due to the United States and clearly recoverable, but to 'compromise,' which implies a claim of doubtful recovery or enforcement.

"In the case which you submit there is nothing to 'compromise,' for the right of recovery and the amount have been finally adjudged by the court of last resort, and the property is said to be sufficient to satisfy the debt."

Whatever may be the power of an executive officer to review the decisions of his predecessors, I think that a claim once fully considered and held unlawful by one Attorney-General can not with propriety be reconsidered by his successor, at least except in some extraordinary case. (2 Opin., 8.) I should not feel justified in reversing the former action of this Department unless I were convinced that it was clearly erroneous.

I am, however, clearly of the opinion that the opinion already given is correct. The construction given to the statute accorded with that of Mr. Evarts (12 Opin., 543), and with that of Mr. Devens and Mr. Phillips (16 Opin., 617). If the opinion of Mr. MacVeagh (17 Opin., 213) is to be construed as holding that a claim may be compromised when there is no doubt of its entire and ready collectibility, I am unable to concur with it. It appears to ignore the clear distinction between the compromise of a doubtful case and the remission of a penalty, forfeiture, or disability. (Rev. Stat., secs. 3461, 5292.) The former power, as said by Mr. Evarts in the opinion above cited, is strictly a fiscal one. The latter is in the nature of a pardoning power. (*The Laura*, 114 U. S., 411, 413-414.)

For the above reasons I have the honor to advise you that in my opinion the application of the International Cotton Press Company should not be granted.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

International Law—Cuban Insurrection—Executive.

INTERNATIONAL LAW—CUBAN INSURRECTION—EXECUTIVE.

International law takes no account of a mere insurrection confined within the limits of a country which has not been protracted or successful enough to secure for those engaged in it recognition as belligerents by their own government or by foreign governments.

The rules of international law with respect to belligerent and neutral rights and duties do not apply to the present Cuban insurrection.

Neither our Government nor our citizens have means of knowledge, and therefore are not bound to take notice, who are and who are not loyal subjects of Spain so long as their actions are confined to her own territory.

A failure by the United States to pass neutrality laws would not diminish its international obligations; so passing them does not increase such obligations.

The mere sale or shipment of arms and munitions of war by persons in the United States to persons in Cuba is not a violation of international law, however strong a suspicion there may be that they are to be used in an insurrection against the Spanish government. Individuals in the United States have a right to sell such articles and ship them to whoever may choose to buy.

The goods, and sometimes the ship carrying them, are subject to seizure by the government within whose jurisdiction they may come, if its domestic laws or regulations are violated, but international law imposes no duty upon our Government with respect to such transactions.

The sale and shipment or carriage of such articles to Cuba does not become a violation of international law merely because they are not destined to a port thereof which is recognized by the Spanish Government as open to commerce, nor because they are to be, or are, landed by stealth.

If, however, the persons supplying or carrying arms and munitions from a place in the United States are in anywise parties to a design that force shall be employed against the authorities of Spain, or that, either in the United States or elsewhere before final delivery of such arms and munitions, men with hostile purpose toward the Spanish Government shall also be taken on board and transported in furtherance of such purpose, the enterprise is not commercial but military, and is in violation of international law and of the United States statutes.

The duty of the United States, when a state of war is declared or recognized by another country, is of its own motion to use diligence to discover and prevent within its borders the formation or departure of any military expedition intended to carry on or take part in such war.

The Executive has no right to interfere with the judiciary in proceedings against persons charged with being concerned in hostile expeditions against friendly nations.

DEPARTMENT OF JUSTICE,

December 10, 1895.

SIR: I have the honor to comply with your request by letter of 5th *ultimo* for a full expression of my views on the legal propositions stated in the communication of the Spanish minister to you of October 19, a copy of which you inclose.

International Law—Cuban Insurrection—Executive.

Referring to the President's proclamation in June last, concerning the insurrection in Cuba, to opinions expressed by officers of this Government, to comments upon recent decisions in cases involving charges of violations of our neutrality laws, and to acts of which he has made complaint, the minister states at length the positions he takes with regard to the rules of international law by which the course of the United States should be directed. The acts complained of were the shipping of arms and munitions of war from ports of the United States under circumstances showing that they were destined for the use of the insurgent forces in Cuba.

The minister says that commerce with that island can not be carried on except through Havana and six other ports which are open to commerce in general, and eight ports which are partially open to commerce; that all these ports are held by the Spanish Government with a sufficient force; that, in order to ship arms and munitions to the insurgents, it is not sufficient to elude the Spanish cruisers about the island and the garrisons at such ports, but vessels carrying such supplies must have pilots who are advised of the movements of the insurgents and have a system of signals with them by means of which the cargoes are delivered to armed bodies prepared to use force; and that, in many cases, such vessels also carry men who are prepared to resort to force to effect the landing of the cargoes. It is therefore evident, he says, that a vessel carrying arms and munitions intended for the insurgents can not deliver them without committing acts of force which make the enterprise military and not commercial. Further, he says, such vessel "may, if cleared for an intermediate port, or if its cargo be taken on board at one port and its men at another, whether that port be in the United States or another country, or if the munitions of war and arms go in one vessel and the men in another, be simply a *part* of a filibustering expedition, but it is, in my judgment, no less a military expedition."

He claims, on the authority of "most eminent writers on international law," that the domestic laws of this country need not be considered by him in asking for the fulfillment of our international obligations, and expresses the opinion

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that when the departure of arms and munitions of which he has furnished information is permitted, or when the persons engaged have been arrested at the moment of embarking and are discharged, not only is international law violated, but the true spirit and meaning of the internal laws of the United States are disregarded.

My views are as follows:

1. International law takes no account of a mere insurrection, confined within the limits of a country, which has not been protracted or successful enough to secure for those engaged in it recognition as belligerents by their own government or by foreign governments. (Cobbett, *Leading Cases on Int. Law*, 87; Glenn's *Int. Law*, sec. 75; Calvo, *Droit Int. T.*, 1, p. 178.)

This is said to result from the equality and dignity of nations, which prevent other nations from taking notice of what passes between a particular one and its own subjects within its own limits (Abdy's *Kent's Int. Law*, pp. 46-47), except in those rare cases where atrocity or barbarity provoke intervention in the interest of humanity.

The facts, so far as they are known, do not bring the Cuban insurrection within the principle of the Prize Cases. (2 Black, 635.) No state of war is acknowledged by Spain and, if the insurgents are in possession of any seaports, no blockade has been declared.

It follows, therefore, that the rules of international law with respect to belligerent and neutral rights and duties do not apply to the present case. Neither Spain nor any other country has recognized the Cuban insurgents as belligerents. They are, therefore, simply Spanish citizens with whom Spain is dealing within her own borders, and the fact that, by common report, they are engaged in armed resistance to her authority is merely a circumstance of suspicion to be considered in any inquiry which may be had concerning the conduct of persons within the United States who may be suspected of hostile intentions toward Spain. But neither our Government nor our citizens have means of knowledge, and therefore can not be bound to take notice who are and who are not loyal subjects of Spain, so long as their actions are confined to her own territory.

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The President's proclamation of June 12 did not change the situation in any respect, but was simply made out of abundant caution in view of the notorious fact that such insurrection existed and that, judging from experience during former insurrections in Cuba, attempts to violate our laws might be made.

While called neutrality laws, because their main purpose is to carry out the obligations imposed upon the United States while occupying a position of neutrality toward belligerents, our laws were intended also to prevent offenses against friendly powers whether such powers should or should not be engaged in war or in attempting to suppress revolt. But as our failure to pass such laws would not diminish our international obligations, so passing them does not increase such obligations.

2. The mere sale or shipment of arms and munitions of war by persons in the United States to persons in Cuba is not a violation of international law, however strong a suspicion there may be that they are to be used in an insurrection against the Spanish Government. The right of individuals in the United States to sell such articles and ship them to whoever may choose to buy has always been maintained. The goods, and in some cases, perhaps, the ship carrying them, are subject to seizure by the government within whose jurisdiction they may come, if its domestic laws or regulations are violated, but international law imposes no duty upon our Government with respect to such transactions. (*The Santissima Trinidad*, 7 Wheaton, 283 (340); *The Bermuda*, 3 Wall., 514; *United States v. Trumbull*, 48 Fed. Rep., 99; *The Itata*, 66 Fed. Rep., 505; *Hendricks v. Gonzales*, 67 Fed. Rep., 351; 2 Pradier-Fodéré Droit Int. Pub., sec. 469; Cobbett's Leading Cases on Int. Law, 167-171; Phillemore's Int. Law, Vol. III, 274; Snow's Cases on Int. Law, 408-420; 11 Opin. Att'y-Gen., 451.)

This principle applies the more strongly in a case like the present than in one where insurgents have been recognized as belligerents. Merchants can not follow their cargoes to Cuba in order to discover the character of their customers; nor can mere carriers conduct an investigation into the

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motives or designs of consignees. Such restrictions on commerce would be most onerous and have never been recognized.

The sale and shipment or carriage of such articles to Cuba does not become a violation of international law merely because they are not destined to a port thereof which is recognized by the Spanish Government as open to commerce, nor because they are to be, or are, landed by stealth. If taking arms, etc., into Cuba, or landing them at particular times or places, be contrary to Spanish law or regulations, so doing would nevertheless be mere smuggling, which must be prevented by the Spanish Government and in no wise concerns that of the United States. The revenue and police regulations of a country have never been recognized by international law as coming within the rules regulating the conduct of other nations. (*The Steamship Florida*, 4 Ben., 452; Abdy's Kent Int. Law, 491; Snow's Cases on Int. Law, 497.)

3. If, however, the persons supplying or carrying arms and munitions from a place in the United States are in any wise parties to a design that force shall be employed against the Spanish authorities, or that, either in the United States or elsewhere, before final delivery of such arms and munitions, men with hostile purposes toward the Spanish Government shall also be taken on board and transported in furtherance of such purposes, the enterprise is not commercial, but military, and is in violation of international law and of our own statutes. (Rev. Stat., 5286; *United States v. Rand*, 17 Fed. Rep., 142; *United States v. The Mary N. Hogan*, 18 Fed. Rep., 529; *United States v. 214 boxes of arms, etc.*, 20 Fed. Rep., 50; *The Conserva*, 38 Fed. Rep., 431; *United States v. Lumsden*, 1 Bond, 105.)

4. The duty of the United States, when a state of war is declared or recognized by another country, is of its own motion to use diligence to discover and prevent, within its borders, the formation or departure of any military expedition intended to carry on or take part in such war. (3 Whart. Dig. Int. Law, pp. 630, 637.) It is by no means certain that knowledge of the existence of a mere insurrection, even when its location or alleged motives may be thought likely to lead to violations of our laws in its behalf, imposes any

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general duty of watchfulness, the neglect of which would be just ground of complaint by the nation involved which does not itself acknowledge a state of war. Actual notice, however, of hostile expeditions against a friendly nation, undertaken or threatened, creates the duty of vigilance to prevent them; and the fact that the different elements intended to constitute a hostile expedition are separately prepared or transported does not change such duty, but merely renders it more difficult to perform. But the obligation is one of diligence and not a guaranty against such expeditions; and what constitutes diligence must always depend on the circumstances in each case. (3 Whart. Dig. Int. Law, p. 639; Creasy Int. Law, pp. 160-164.)

5. It can not be truly said that our laws, which have been tested by the experience of a century, do not fully cover and adequately punish all violations of the duties imposed both by international law and by treaty on all persons within the United States. Nor can it be charged that our courts are either unfair or inefficient. I do not understand the expressions in the minister's letter to indicate anything more than dissatisfaction at the result of some recent prosecutions wherein strong suspicion appeared to lack convincing proof. It is therefore, ordinarily, due diligence to cause the arrest and trial by our courts of persons charged with engaging in enterprises against the authority of Spain which our laws forbid.

If there should be a manifest failure of justice in such a judicial proceeding, resulting in the consummation of a hostile enterprise against Spain causing her damage capable of proof, the question would arise whether under the ruling of the Geneva tribunal (III Whart. Int. Law Dig., sec. 329, p. 193; *id.*, sec. 238, pp. 672-673; and 11 Opin., p. 117) Spain would be concluded by the judgment. This question would be somewhat differently presented in cases where such proceedings are commenced on the complaint of the Spanish authorities and they are afforded and embrace the opportunity to present evidence or attend by counsel. I do not understand, however, that I am now required to determine this question.

It has been held that persons justly suspected of an inten-

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tion to engage in such enterprises may be required by the courts to give bond not to do so. (*United States v. John A. Quitman*, 2 Am. Law Reg., 645.) Persons in charge of any armed vessel may be required to give like security as a condition of clearance. (Rev. Stat., secs. 5289, 5290.)

It is certain, however, that the Executive has no right to interfere with or control the action of the judiciary in proceedings against persons charged with being concerned in hostile expeditions against friendly nations. The President may employ the military and naval forces to disperse or prevent the departure from our territory of any such expedition, or of any men, arms, or munitions which are manifestly parts thereof; and, being a coordinate authority, he would not be precluded from so doing, in a proper case, by the action of the judiciary. But it is plain that such means are practicable only when there is open defiance of the authority of the Government by an organized body of men.

Occasions may be imagined when the summary process of martial law might perhaps be resorted to against the persons composing such a body. But in all such cases as those which have come to the notice of the Government these conditions do not exist, and the judicial authority is the only one which can be properly or efficiently invoked. (See Mr. Bayard to the Spanish minister, 3 Whart. Dig. Int. Law, p. 625.) Our Government possesses all the attributes of sovereignty with respect to the present subject, and has for their exercise the appropriate agencies which are recognized among civilized nations; but our Constitution forbids the arbitrary exercise of power when the liberty or property of individual citizens is involved. It can not therefore resort to some measures which are still possible in some countries. But I do not think that it can be held chargeable with lack of diligence for not taking steps which would be inconsistent with the principles on which all republics are founded.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF STATE.

Treaty of Guadalupe Hidalgo—International Law.

TREATY OF GUADALUPE HIDALGO—INTERNATIONAL LAW.

Article VII of the treaty of February 2, 1848, between Mexico and the United States, known as the treaty of Guadalupe Hidalgo, is still in force, so far as it affects the Rio Grande.

The taking of water for irrigation from the Rio Grande above the point where it ceases to be entirely within the United States and becomes the boundary between the United States and Mexico is not prohibited by said treaty.

Article VII is limited in terms to that part of the Rio Grande lying below the southern boundary of New Mexico, and applies to such works alone as either party might construct on its own side.

The only right the treaty professed to create or protect with respect to the Rio Grande was that of navigation. Claims against the United States by Mexico for indemnity for injuries to agriculture alone, caused by scarcity of water resulting from irrigation ditches wholly within the United States at places far above the head of navigation, find no support in the treaty.

The rules, principles, and precedents of international law impose no duty or obligation upon the United States of denying to its inhabitants the use of the water of that part of the Rio Grande lying entirely within the United States, although such use results in reducing the volume of water in the river below the point where it ceases to be entirely within the United States.

The fact that there is not enough water in the Rio Grande for the use of the inhabitants of both countries for irrigation purposes does not give Mexico the right to subject the United States to the burden of arresting its development and denying to its inhabitants the use of a provision which nature has supplied, entirely within its own territory. The recognition of such a right is entirely inconsistent with the sovereignty of the United States over its national domain.

DEPARTMENT OF JUSTICE,

December 12, 1895.

SIR: I have the honor to acknowledge the receipt of your letter of the 5th *ultimo* in which you refer to the concurrent resolution of Congress passed April 29, 1890, providing for negotiations with the Government of Mexico with a view to the remedy of certain difficulties mentioned in the preamble to such resolution, which arise from the taking of water for irrigation from the Rio Grande above the point where it ceases to be entirely within the United States and becomes the boundary between the United States and Mexico. I have also the copy which you inclose of the note of the Mexican minister to yourself, dated October 21, 1895, in which he states at length the position taken by his Government.

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You say: "The negotiations with which the President, acting through the Department of State, is charged by the foregoing resolution, can not be intelligently conducted unless the legal rights and obligations of the two Governments concerned and the responsibility of either, if any, for the disastrous state of things depicted in the Mexican minister's letter are first ascertained.

"I have the honor, therefore, to call your attention to the legal propositions asserted in Mr. Romero's letter and to inquire whether, in your judgment, those propositions correctly state the law applicable to the case—in other words: (1) Are the provisions of article 7 of the treaty of February 2, 1848, known as the treaty of Guadalupe Hidalgo, still in force so far as the river Rio Grande is concerned, either because never annulled or because recognized and reaffirmed by article 5 of the convention between the United States and Mexico of November 12, 1884? (2) By the principles of international law, independent of any special treaty or convention, may Mexico rightfully claim that the obstructions and diversions of the waters of the Rio Grande in the Mexican minister's note referred to, are violations of its rights which should not continue for the future and on account of which, so far as the past is concerned, Mexico should be awarded adequate indemnity?"

I reply as follows:

(1) Article VII of the treaty of Guadalupe Hidalgo, while it was declared to have been rendered nugatory for the most part by the first clause of Article IV of the treaty concluded December 30, 1853, and proclaimed June 30, 1854, was, by the second clause thereof, reaffirmed as to the Rio Grande (*nom.* Rio Bravo del Norte) below the point where, by the lines as fixed by the latter treaty, that river became the boundary between the two countries. Said Article VII is recognized as still in force by Article V of the convention concluded November 12, 1884, and proclaimed September 14, 1886.

So far, therefore, as it affects the subject now in hand, said Article VII, in my opinion, is still in force. I am unable, however, to agree with the minister in the interpretation which he gives it.

Treaty of Guadalupe Hidalgo—International Law.

His statement is that the city of El Paso del Norte has existed for more than three hundred years, during almost all of which time its people have enjoyed the use of the water of the Rio Grande for the irrigation of their lands. As that city and the districts within its jurisdiction did not need more than 20 cubic meters of water per second, which was an almost infinitesimal portion of the volume of water even in times of severest drought, they had sufficient water for their crops until about ten years ago, when a great many trenches were dug in Colorado, especially in the St. Louis Valley and in New Mexico, through which the upper Rio Grande and its affluents flow, so greatly diminishing the water in the river at El Paso that, except when rains happen to be abundant, there is scarcity of water from the middle of June until March. In 1894 the river was entirely dry by June 15, so that no crops could be raised and even fruit trees began to wither. The result has been to reduce the price of land and cause great hardships to the people, whose numbers in Paso del Norte, Zaragoza, Tres Jacales, Guadalupe, and San Ignacio diminished from 20,000 in 1875 to one-half that number in 1894.

The minister further states that from a report of the assistant quartermaster-general addressed to the General in Chief of the United States Army, dated September 5, 1850, it appears that Captain Lowe (meaning Love), U. S. A., ascended the river in a vessel to a point several kilometers above Paso del Norte, showing that it was then navigable at that place. The minister has been misinformed. The original report, which is now before me, shows that Captain Love was instructed to carry "to the highest attainable point in the Rio Grande" his small keel boat, which "drew, with her crew, provisions, arms, etc., on board, 18 inches of water." He found this point at some "impassable falls," which he named "Brookes Falls." Carrying around them "the skiff which had accompanied his boat," he rowed 47 miles farther to other falls, which he named "Babbitts Falls." "Beyond this point he found it impossible to proceed with the skiff either by land or water," and it was "about 150 miles by land below El Paso."

The minister contends that the irrigation ditches in Colo-

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rado and New Mexico, which result in diminishing the flow of water at El Paso, come within the treaty prohibitions of "any work that may impede or interrupt, in whole or in part, the exercise of this right" (of navigation), because, as he says, "nothing could impede it more absolutely than works which wholly turn aside the water of these rivers." But Article VII is limited in terms to "the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico." Article IV of the treaty of 1853 continues the provisions of said Article VII in force "only so far as regards the Rio Bravo del Norte below the initial of said boundary provided in the first article of this treaty." It is that part alone which is made free and common to the navigation of both countries, and to which the various prohibitions apply. It is plain that neither party could have had, in framing these restrictions, any such intention as that now suggested. The fact, if such it were, that the parties did not think of the possibility of such acts as those now complained of would not operate to restrain language sufficiently broad to include them, but the terms used in the treaty are not fairly capable of such a construction.

They naturally apply only to the part of the river with which the parties were dealing, and to such works alone as either party might construct on its own side if not restrained. Though equally divided, in theory, between the two nations where it is their boundary, the river is in fact a unit for purposes of navigation, and therefore the treaty required the consent of both for the construction of "any work that may impede or interrupt" navigation, even though it should be "for the purpose of favoring new methods of navigation." (Art. VII.) Up to the head of navigation no such work could have been constructed save by one of the two Governments or by its authority. The prohibition was, therefore, appropriately made applicable to them alone, and not to the citizens of either—"neither shall, without consent of the other, construct," etc. Above the head of navigation, where the river would be wholly within the United States, different rules would apply and private rights exist which the Government could not control or take away save by the exercise of the power of eminent domain, so that clear and explicit

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language would be required to impose upon the United States such obligations as would result from the construction of the treaty now suggested.

Moreover, the only right the treaty professed to create or protect with respect to the Rio Grande was that of navigation. The claim now made is for injuries to agriculture alone at places far above the head of navigation. Captain Love, in the report referred to, said: "The mouth of Devils River, which is about 100 miles below the mouth of the Puerco (Pecos) and 617 above Ringgold Barracks, is the head of steamboat navigation," and that "with some difficulty" navigation by keel boats was possible "to a point 56 miles above the 'Grand Indian Crossing,' or about 283 miles above the mouth of Devils River." So far as appears, the large and numerous tributaries below El Paso supply a sufficient volume of water for the needs of navigation.

In fact, the part of the treaty now under consideration merely expresses substantially the same rights and duties which international law would imply from the fixing of the middle of the river as the boundary, viz, free navigation of the entire stream below the point where it becomes common to both nations without any levy or exaction or the construction of any work which might impede or interrupt navigation without the consent of both.

In my opinion, therefore, the claim now made by Mexico finds no support in the treaty. On the contrary, the treaty affords an effective answer to the claim by the well-known rule that the expression of certain rights and obligations in an agreement implies the exclusion of all others with relation to the same subject.

It is not necessary in order to bring this principle into play that it shall appear that either party or both actually thought of the particular matter whose exclusion is asserted, although that fact, when it appears, may serve to emphasize the inference. I am not advised whether the subject of the use of the water of the Rio Grande for irrigation was mentioned during the negotiations or not, but it is stated that such use had long been made by the Mexicans, and it was known that agriculture could not be carried on in that region without it. It was known, too—certainly to Mexico—that

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this necessity existed also throughout the entire region watered by the upper Rio Grande and its tributaries, for, as a province of Spain and then as an independent nation, Mexico had included both New Mexico and Colorado, and from the independence of Texas, in 1836, down to the treaty of 1848 Mexico's eastern boundary was the Rio Grande to its source. By this treaty Mexico ceded to the United States the territory west of the Rio Grande and north of the southern boundary of New Mexico, just as she had abandoned to Texas all the territory east of that river, without any reservations, restrictions, or stipulations concerning the river except those above mentioned.

Settlements had long existed in the region of Santa Fe, and the probability of the ultimate settlement of the entire territory along the Rio Grande must have been apparent to both parties. Yet the treaty made no attempt to create or reserve to Mexico or her citizens any rights or to impose on the United States or their citizens any restraints with respect to the use of water for irrigation, although rights of property in the territory were secured to all Mexicans whether established there or not. (Art. VIII.)

The treaty of 1848 was a treaty of peace; and a different rule for the construction of such treaties is laid down by some writers. (Vattel, *Law of Nations*, Chitty's Ed., p. 433.) If it be suggested that the circumstances under which this treaty was made bring its terms, as against the United States, within the operation of such rule, it is a sufficient answer that, even if the existence of the rule be acknowledged, it simply subjects provisions in favor of the United States to strict construction; like all rules of construction, it has no application except in cases of doubtful meaning of language used, and can not be made the means of introducing new terms. Moreover, the United States paid \$15,000,000 for the territory acquired by the treaty (Art. XII), and by the treaty of 1853, which was not a treaty of peace, Mexico ceded further territory in consideration of \$10,000,000 (Art. III), repeating without enlarging the stipulations of the former treaty as to rights on the Rio Grande.

(2) I have given my opinion of the construction and effect of the treaty because it is responsive to your general request,

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though not to your specific questions. That opinion, perhaps, in strictness, makes it unnecessary for me to consider your second question, but as that question is not put alternatively or conditionally, I proceed.

An extended search affords no precedent or authority which has a direct bearing.

There have been disputes about rights of navigation of international rivers, but they have been settled by treaty. (For a list of such treaties see Heffter *Droit Int.*, Appendix VIII.) The subject is fully discussed by Hall (*Int. Law*, sec. 39), who denies that the people on the upper part of a navigable river have a natural right to pass over it through foreign territory to its mouth. But if such right be conceded, no aid is afforded for the present inquiry, because use for navigation, being common, would not curtail use by the proprietary country, while in the case now presented, there not being enough water for irrigation in both countries, the question is, which shall yield to the other.

It is stated by some authors that an obligation rests upon every country to receive streams which naturally flow into it from other countries, and they refer to this as a natural international servitude. (Heffter *Droit Int.*, sec. 43; 1 Philimore *Int. Law*, p. 303.) Others deny the existence of all international servitudes, apart from agreement in some form. (Letters of Grotius quoted, 2 Hert., p. 106; Klüber *Droit des Gens Moderne*, sec. 139; Bluntschli *Droit Int. Cod.*; Woolsey's *Int. Law*, sec. 58; 1 Calvo *Droit Int.*, sec. 556.)

Such a servitude, however, if its existence be conceded, would not cover the present case or afford any real analogy to it. The servient country may not obstruct the stream so as to cause the water to back up and overflow the territories of the other. The dominant country may not divert the course of the stream so as to throw it upon the territory of the other at a different place. (See authorities *supra*.) In either of such cases there would be a direct invasion and injury by one of the nations of the territory of the other. But when the use of water by the inhabitants of the upper country results in reducing the volume which enters the other, it is a diminution of the servitude. The injury now complained of is a remote and indirect consequence of acts which

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operate as a deprivation by prior enjoyment. So it is evident that what is really contended for is a servitude which makes the lower country dominant and subjects the upper country to the burden of arresting its development and denying to its inhabitants the use of a provision which nature has supplied entirely within its own territory.

Such a consequence of the doctrine of international servitude is not within the language used by any writer with whose works I am familiar, and could not have been within the range of his thought without finding expression.

Both the common and the civil law undertake to regulate the use of the water of navigable streams by the different persons entitled to it. Neither has fixed any absolute rule, but both leave each case to be decided upon its own circumstances. But I need not enter upon a discussion of the rules and principles of either system in this regard, because both are municipal and, especially as they relate to real property, can have no operation beyond national boundaries. (Creasy Int. Law, p. 164.) So they can only settle rights of citizens of the same country *inter sese*. The question must, therefore, be determined by considerations different from those which would apply between individual citizens of either country. Even if such a question could arise as a private one between citizens of one country and those of another, it is not so presented here. The mere assertion of the claim by Mexico would make it a national one even if it were of a private nature. (*Gray v. United States*, 1 O. Cls. R., 391–392.) But the use of water complained of and the resulting injuries are general throughout extended regions, so that effects upon individual rights can not be traced to individual causes, and the claim is by one nation against the other in fact as well as form.

The fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its own territory. Of the nature and scope of sovereignty with respect to judicial jurisdiction, which is one of its elements, Chief Justice Marshall said (*Schooner Exchange v. McFaddon*, 7 Cranch, p. 136):

“The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no

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limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

“All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source.”

It would be entirely useless to multiply authorities. So strongly is the principle of general and absolute sovereignty maintained that it has even been asserted by high authority that admitted international servitudes cease when they conflict with the necessities of the servient state. (Bluntschli, p. 212; see criticism by Creasy, p. 258.) Whether this be true or not, its assertion serves to emphasize the truth that self-preservation is one of the first laws of nations. No believer in the doctrine of natural servitudes has ever suggested one which would interfere with the enjoyment by a nation within its own territory of whatever was necessary to the development of its resources or the comfort of its people.

The immediate as well as the possible consequences of the right asserted by Mexico show that its recognition is entirely inconsistent with the sovereignty of the United States over its national domain. Apart from the sum demanded by way of indemnity for the past, the claim involves not only the arrest of further settlement and development of large regions of country, but the abandonment, in great measure at least, of what has already been accomplished.

It is well known that the clearing and settlement of a wooded country affects the flow of streams, making it not only generally less, but also subjecting it to more sudden fluctuations between greater extremes, thereby exposing inhabitants on their banks to increase of the double danger of drought and flood. The principle now asserted might lead to consequences in other cases which need only be suggested.

It will be remembered that a large part of the territory in question was public domain of Mexico and was ceded as such to the United States, so that their proprietary as well as their sovereign rights are involved.

Remission of Penalties.

It is not suggested that the injuries complained of are or have been in any measure due to wantonness or wastefulness in the use of water or to any design or intention to injure. The water is simply insufficient to supply the needs of the great stretch of arid country through which the river, never large in the dry season, flows, giving much and receiving little.

The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from considerations of comity is a question which does not pertain to this Department; but that question should be decided as one of policy only, because, in my opinion, the rules, principles, and precedents of international law impose no liability or obligation upon the United States.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF STATE.

REMISSION OF PENALTIES.

The Secretary of the Treasury has the power to remit penal duties under Revised Statutes, section 5293, in the case of any invoice under \$1,000, although it may be part of an entry whose total amount is over \$1,000.

Revised Statutes, section 5292, in its relation to penal duties, was repealed by the act of June 22, 1874, chapter 391.

DEPARTMENT OF JUSTICE,

December 13, 1895.

SIR: I have the honor to acknowledge your communication of December 10 concerning the penal duties levied upon certain sugar imported at the port of New York. It appears that a firm of consignees representing two different principals made an entry covering two invoices of sugar imported by the same vessel. One invoice was from the island of Trinidad in the British possessions, the other from Paramaribo in Dutch Guiana. Upon each invoice penal duty accrued under the provisions of section 7 of the customs-administrative act of June 10, 1890. Upon each the penal duty was less than \$1,000, but the duties if combined exceed \$1,000. You ask me whether you are authorized to

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remit these penal duties under the provisions of section 5293 of the Revised Statutes.

It is well settled that these penal duties are penalties which come within your general power of remission. (4 Opin., 182; 20 Opin., 660; 21 Opin., 90, 101.) Your power under section 5293 is limited to cases where the amount of the penalty does not exceed \$1,000.

You ask me to advise you whether the invoice or the entry is to be treated as the unit. In my opinion the invoice is to be treated as the unit. One firm of consignees often, as in this case, has consignments coming from different principals who have nothing in common except that they employ the same agent at the port of importation. Section 5 of the customs-administrative act forces the agent to include all the invoices received by him in the same declaration. I do not think, however, that this requires the penal duties upon the various articles imported to be lumped together so as to deprive the principals of the benefit of the simple and easy proceedings for remission in small cases provided by section 5293.

As you refer to section 5292 of the Revised Statutes, I would call your attention to the fact that this section in its relation to penal duties was repealed by the antimoiety act of June 22, 1874, chapter 391, section 17. (21 Opin., 102.)

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

SEAMEN—REMUNERATION.

Section 4609, Revised Statutes, does not forbid the demand or receipt of remuneration, by any one, from any seaman or person seeking employment as such on sail or steam vessels engaged in the coastwise trade, except as stated in the opinion.

DEPARTMENT OF JUSTICE,

December 23, 1895.

SIR: I have the honor to give my opinion as requested in your letter of September 24 for your guidance in the issue of instructions to United States shipping commissioners upon

Seamen—Remuneration.

the question "whether section 4609, Revised Statutes, should be construed to apply to seamen shipped in foreign trade, or should be applied generally for the protection of all seamen in both foreign and coasting trade."

Section 4609 originated in section 11 of an act authorizing the appointment of shipping commissioners by the several circuit courts of the United States, etc., passed June 7, 1872 (17 Stat., 262.) Its terms were changed in the Revised Statutes so as to apply to all persons instead of to shipping commissioners, their clerks and employees. This fact, in connection with the definitions given in section 4612, would lead to the conclusion that the prohibition in section 4609 forbids the demand or receipt, by anyone, from any seamen or persons seeking employment as such in the coasting trade or otherwise, of remuneration, other than commissioner's fees, for obtaining such employment, but for the act of June 9, 1874 (18 Stat., 64), which provides that none of the provisions of the act of June 7, 1872, "shall apply to sail or steam vessels engaged in the coastwise trade," except as therein stated, the exceptions stated being "the coastwise trade between the Atlantic and Pacific coasts," "the lake-going trade touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions," and cases "where the seamen are by customary agreement entitled to participate in the profits or result of a cruise or voyage."

Section 5601 declares that acts passed since the date of the Revised Statutes, December 1, 1873, shall have full effect, notwithstanding the revision, so that the reenactment in a changed form of section 11 of the act of 1872 as section 4609 does not prevent the application to it of the act of 1874. (*United States v. Buckley*, 12 Sawyer, 508; *United States v. King*, 23 Fed. Rep., 138-141; *Scott v. Rose*, 2 Lowell, 381.)

That Congress so understood the effect of the act of 1874 appears from the acts of June 19, 1886, section 2 (1 Supp. Rev. Stat., 493), and August 19, 1890 (*id.*, 780, chap. 801), which extend to vessels in the coastwise trade certain sections of Title LIII, Merchant Seamen, of which section 4609 is a part, but do not include that section. The only other act upon the subject is that of February 18, 1895, which contains

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nothing that restores the operation of section 4609 to vessels engaged in the coasting trade generally, or to seamen employed or seeking employment thereon.

Your instructions, therefore, should not direct that section 4609 be applied generally for the protection of all seamen in both foreign and coasting trade.

Respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

REVENUE-CUTTER SERVICE.

Under the act of March 2, 1895, chapter 189, officers of the Revenue-Cutter Service who have been placed upon permanent waiting orders are withdrawn from the line of promotion, but may be restored to the service in their former rank when their disability ceases.

There is no legal limitation of the number of these officers.

An officer is "permanently incapacitated" within the meaning of this act, as of the pension acts, when his disability appears to be chronic or of indefinite future duration.

DEPARTMENT OF JUSTICE,

December 23, 1895.

SIR: I have the honor to acknowledge your communication of December 5, asking an official opinion as to the construction of that provision of the sundry civil appropriation act of March 2, 1895, chapter 189 (28 Stat., 910), which relates to the Revenue-Cutter Service.

The President is authorized to procure a medical report upon all officers of that Service who "through no vicious habits of their own are now incapacitated, by reason of the infirmities of age or physical or mental disability, to efficiently perform the duties of their respective offices." Those who "may be reported by said board to be so permanently incapacitated shall be placed on waiting orders out of the line of promotion, with one-half active-duty pay, and the vacancies thereby created in the active list of the officers shall be filled by promotion in the order of seniority as now provided by law," etc.

The chief engineer was examined last spring under the act and reported as being permanently incapacitated. You

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inform me that he was thereupon placed upon "permanent waiting orders." You now ask my opinion, however, whether these "permanent waiting orders" were really "permanent;" or whether he "can be restored to the active list without Congressional action, should he be found upon a reexamination to be qualified physically to perform active duty."

This act is so badly drawn that it is practically impossible to give it a satisfactory construction.

Its use of the word "permanently" would tend to indicate that it was intended to provide for absolute retirement from the service. There is, however, a well-recognized distinction between retirement and "waiting orders." (See Rev. Stat., secs. 1443 et seq.; sec. 1556.) Moreover, it is unnecessary to give so sweeping an interpretation to the word "permanently." A disability may properly be said to be permanent when it appears to be chronic or of indefinite future duration; just as an innkeeper distinguishes the "permanents" from the "transients" among his guests. The term seems to be used in this sense in the statutes. Thus, the officers and seamen of the Revenue-Cutter Service, when wounded or disabled, are entitled to be placed on the navy pension list (sec. 4741); and therefore they may be pensioned at various rates "in cases of permanent specific disability," while the pension is to "continue during the existence of the disability" (sec. 4692). Hence it is held in the Pension Bureau that the granting of a pension for "permanent specific disability" does not necessarily imply an adjudication that the disability is one which can not terminate.

On the other hand, the "waiting orders" of this statute are not the same thing as the "waiting orders" previously known in the Revenue Cutter Service. For instance, the pay of a captain under the old "waiting orders" is \$1,800 a year (sec. 2753); under the new "waiting orders," \$1,250. Moreover, the former "waiting orders" did not affect the line of promotion.

On the whole, I think that the act should be construed as establishing a class of officers who may be properly termed, as you term them, upon "permanent waiting orders;" that this class are neither upon "waiting orders" properly so called nor upon a retired list; that while they are upon

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"permanent waiting orders" they are withdrawn from the line of promotion, but that in case their disability should be found to have ceased at any time they may be restored to the Service in their former rank.

I have not referred to the proviso "that the number of officers upon the active list now authorized by law shall not be increased by this act." It is impossible to give any effect whatever to this proviso, because there is no legal limitation of the number of such officers.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

PUBLIC WORKS.

The Secretary of the Navy has no power to incur any obligation for work on an uncompleted dry dock when the appropriation has been exhausted, even though immediate action is very important.

DEPARTMENT OF JUSTICE,

January 2, 1896.

SIR: I have the honor to acknowledge your communication of December 30 with relation to the new dry dock in the Brooklyn Navy-Yard. I assume that you have referred me to all the statutory provisions specially referring to this dry dock. It appears that the work upon the dry dock is not yet completed, but that the appropriations therefor have been exhausted; that by an immediate expenditure of about \$1,500 the efficiency of the dock will be greatly promoted; but that the condition of the work is such that the change must be made at once in order to avoid a very great increase in the cost, amounting to many times the sum for which it can be now done. You inform me that the contractors are willing to undertake the additional work and wait for an appropriation act for their pay; and you ask whether you have authority to incur any obligation. In view of the provisions of sections 3732, 3733, and 5503 of the Revised Statutes, I am obliged to answer in the negative.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE NAVY.

Remission of Penalties—Civil Service Commission.

REMISSION OF PENALTIES.

In proceedings for remission of penalties under the act of June 22, 1874, chapter 391, the Secretary of the Treasury may return the findings to the United States commissioner for a further hearing before him upon a claim of newly discovered evidence.

DEPARTMENT OF JUSTICE,

January 4, 1896.

SIR: Your communication of December 31 asks my opinion whether it is within your discretion in remission proceedings under the antimoiety act of June 22, 1874, chapter 391, sections 17 and 18, to return the findings to the United States commissioner for a further hearing before him upon a claim of newly discovered evidence. It was the opinion of the court in *The Palo Alto* (2 Ware, 343), that the Secretary had such power under the act of March 3, 1797, chapter 13, section 1, which, so far as the present question is concerned, is similar to the act now in force. Your question is therefore answered in the affirmative. It would appear from the result of the case above cited that this power to order rehearings is one of much greater advantage to the claimant than to the Government. The question, however, whether any restrictions are needed, is one for the sole determination of the Secretary of the Treasury.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

CIVIL SERVICE COMMISSION.

An irregularity in the certification of the name of an eligible for appointment under the civil service is cured by the probational and absolute appointment of such a person.

DEPARTMENT OF JUSTICE,

January 9, 1896.

SIR: I have the honor to acknowledge your communication of December 31, accompanying a letter from the Civil Service Commission, asking my opinion upon the case of Mr.

Civil Service Commission.

Frank C. Moore. It appears that on February 11, 1895, the surveyor of customs at St. Louis, Mo., in accordance with the civil-service rules, requested certifications of male eligibles for filling two vacancies in the grade of clerk. Moore's name was the sixth on the eligible list, and should probably therefore not have been certified (Customs Rule IV, sec. 1), although possibly, had everything been done regularly, it would eventually have appeared. (General Rule IV, sec. 3.) The surveyor, assuming, as he had a right to do, that the certification made to him was in accordance with the civil-service rules and regulations, selected Moore, who was probationally appointed, served six months, and was then absolutely appointed to fill one of such vacancies. It is not suggested that the certifying of Mr. Moore's name was due to anything but a mere error or inadvertence on the part of the person who drew the certificate, or that Moore was in any wise responsible for or a party to the error. Nor is there any complaint as to his fitness or fidelity in the discharge of his duties. You ask me, among other things, whether Moore's appointment "can be considered conclusive, notwithstanding the fact that his place on the eligible list did not entitle him to certification."

The civil-service act of January 16, 1883, chapter 27, section 2, relating to the civil-service rules, provides, among other things, as follows:

"When said rules shall have been promulgated it shall be the duty of all officers of the United States in the Departments and offices to which any such rules may relate to aid in all proper ways in carrying said rules and any modifications thereof into effect."

The same section provides that positions in the classified service "shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations;" but it does not specify the number of eligibles from whom a selection may be made. That is left to be determined by rules drawn by the President.

There must be some point of time when the mere irregularities in certification must be regarded as cured. The civil-service rules have no greater dignity than the law which authorizes them, and it would be highly unreasonable that

Forfeitures—Statutory Construction.

persons who have left other employments should be ousted from positions which they are satisfactorily filling simply because it is discovered that employees of the Civil Service Commission have made mistakes in their certifications. To hold that the irregularity in the present case has been cured by the probational and absolute appointments of Mr. Moore and by his long service is in line with the decisions of the courts upon cognate questions, and with the opinion of Attorney-General Miller in 20 Opinions, 274, in which it was held that an appointment made contrary to the rule of apportionment enjoined by the statute should not be disturbed because the violation of the rule had been due to mere inadvertence, though the fault was that of the appointee in failing to give notice of a change of residence which occurred between his examination and his appointment. I therefore answer that the appointment should now be considered conclusive. The irregular certification should not, under the last paragraph of Customs Rule IV, section 1, be counted against the persons certified with Moore. This is the only correction of the error which is now possible.

Answers to the other questions put by the Civil Service Commissioners seem to be unnecessary.

Very respectfully,

JUDSON HARMON.

The PRESIDENT.

FORFEITURES—STATUTORY CONSTRUCTION.

Revised Statutes, section 5294, as amended by the act of December 15, 1894, chapter 7, applied to fines and penalties only, and did not authorize the Secretary of the Treasury to remit a forfeiture. A clear omission from a statute can not be supplied upon any considerations of supposed oversight, inconsistency, or hardship.

DEPARTMENT OF JUSTICE,

January 10, 1896.

SIR: I have the honor to acknowledge your communication of January 8 relating to the American schooners *Winchester* and *Bowhead*. It appears from your letter that libels for forfeiture are pending against these vessels under the Bering Sea act of April 6, 1894, chapter 57, section 8. Application

Forfeitures—Statutory Construction.

has been made to you for a remission of the forfeiture, and you ask my opinion as to your authority to consider it.

If these proceedings had been brought for the purpose of collecting pecuniary penalties, like that under consideration in *The Laura* (114 U. S., 411), you would have the power to remit under section 5294 of the Revised Statutes as amended by the act of December 15, 1894, chapter 7, which is as follows:

“The Secretary of the Treasury may, upon application therefor, remit or mitigate any fine or penalty provided for in laws relating to vessels, or discontinue any prosecution to recover penalties denounced in such laws, except the penalty of imprisonment or of removal from office, upon such terms as he in his discretion shall think proper.”

These proceedings, however, are not to collect penalties, but, as I understand, to enforce forfeitures of the vessels, together with their tackle, etc.

Section 5294 is contained in a chapter of the Revised Statutes which includes other sections providing for remission in various cases. These sections recognize the well-known distinction between a penalty and a forfeiture. (Secs. 5292, 5293, 5294, 5295.) Other sections of the Revised Statutes show that the distinction was observed by the revisers. (Secs. 1841, 1958, 2858, 3078, 3461; see also the antimoiety act of June 22, 1874, chap. 391.)

Section 5292 of the Revised Statutes provides for the mitigation or remission of fines, penalties, and forfeitures incurred under the customs and navigation laws. Section 5294 provided for the remission of fines or penalties provided for in laws relating to steam vessels, but did not mention forfeitures. The amendment extended the section to all vessels, but did not broaden its terms so as to include forfeitures of vessels.

A clear omission from a statute, like this, can not be supplied upon any considerations of supposed oversight, inconsistency, or hardship.

I am therefore compelled to advise you that you have no authority to remit in the present case.

Very respectfully, JUDSON HARMON.
The SECRETARY OF THE TREASURY.

Secretary of War—Bridges.

SECRETARY OF WAR—BRIDGES.

Where a State has granted authority to construct a bridge over a navigable river, and the location and plan have been approved by the Secretary of War, the question whether the purchasers of such right are authorized to proceed is one which does not concern the Government. The action of a State with reference to the rights of the parties among themselves concerning the construction of a bridge does not affect the interests of the United States so long as the directions concerning the location and plan of the bridge are respected.

DEPARTMENT OF JUSTICE,

January 18, 1896.

SIR: I have the honor to acknowledge your communication of January 15 concerning the East River bridge commission.

It appears that by an act of the legislature of the State of New York, approved March 9, 1892, chapter 101, the East River Bridge Company was incorporated for the purpose of constructing a bridge over certain navigable waters between the cities of New York and Brooklyn; and that by an act of May 27, 1895, chapter 789, a commission was provided for, representing the cities of New York and Brooklyn, which commission was authorized to purchase the rights and powers of any corporation which might possess a valid charter to build said bridge, it being the intent of the act that the bridge should be built by the commissioners as a public enterprise.

By section 7 of the river and harbor act of September 19, 1890, chapter 907, as amended by section 3 of the river and harbor act of July 13, 1892, chapter 158, it was made unlawful to commence the construction of any bridge in navigable waters of the United States under any act of the legislative assembly of any State until the location and plan of such bridge be approved by the Secretary of War.

You inform me that under this act your predecessor has approved a location and plan submitted by the East River Bridge Company for the bridge aforesaid. You now ask me whether, by purchase of the rights of the East River Bridge Company, the commission aforesaid is authorized to proceed to construct the bridge. This is a question which I do not think concerns the Government. The action of the State of New York with reference to the rights of the parties among themselves does not affect the interests of the United States so long as your directions concerning the location and plan

Railways—Secretary of War.

of the bridge are respected by whatever corporation or commission may actually perform the work of building it.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF WAR.

RAILWAYS—SECRETARY OF WAR.

The Secretary of War is not authorized to approve a survey of a railway over lands of the United States, under the provisions of the act of July 29, 1892, chapter 322, where the inner rail of said railway will be less than the required distance from the point specified in said act.

DEPARTMENT OF JUSTICE,

January 21, 1896.

SIR: In your letter of January 15, 1895, you request an opinion from me as to whether or not you are authorized to approve a certain survey of the railway of the Washington and Great Falls Electric Railway Company over lands of the United States pertaining to the Washington Aqueduct, under the provisions of the act incorporating said company, approved July 29, 1892, as follows:

“Wherever the said railway shall run over or across any of the lands of the United States or any of the accessory works of the Washington Aqueduct, as provided in this act, it shall be done only on such lines, in such manner, and on such conditions as shall be approved by the Secretary of War and accepted by said company, and no work shall be done on said railway on any of said lands until after such approval and acceptance in writing.”

You state that in the survey of which approval is asked “the inner rail of said Washington and Great Falls Railway” will be “less than 100 feet of the middle of the paved portion of the Conduit road,” but will not be less than 50 feet from the same, and that the Washington and Great Falls Railway Company has purchased the property, rights, and franchises of the Glen Echo Railroad Company, “incorporated by an act of Congress approved June 15, 1892, and claims, by right of that purchase, to be entitled to locate the

Railways—Secretary of War.

inner rail of its railroad less than 100 feet from the middle of the paved portion of the Conduit road, provided it will not be less than 50 feet from the same."

The act of July 29, 1892, entitled "An act to incorporate the Washington and Great Falls Electric Railway Company," provides that "the inner rail of said Washington and Great Falls Railway shall not at any place on the line of said railway be less than 100 feet from the middle of the paved portion of the Conduit road."

This is a restriction upon your authority to approve, and I am of opinion that the language set out in your letter above quoted does not authorize an approval of the survey as submitted.

The act of June 15, 1892 (27 Stat., 51), does not incorporate the Glen Echo Railroad Company. It merely gives it a license "to extend and operate its line of railway across the Washington Aqueduct and the land pertaining thereto in Montgomery County in said State." The provision that "at no point on the line of said Glen Echo Railroad, except at the crossing aforesaid, or of any extension of said railroad under whatever name, shall the inner rail be less than 50 feet from the middle of the paved portion of the Conduit road," is not a license but a restriction upon the license above given.

Said act does not authorize the Glen Echo Railroad Company to parallel the Aqueduct upon land of the Government upon condition that the inner rail shall not come within less than 50 feet from the middle of the paved portion of the Conduit road.

The papers accompanying your letter show that the location sought to be made by your approval on land of the Government is not incident to nor in any way connected with the exercise of the right to cross conferred by the act of June 15, 1892. On the contrary, the portion of the road thus sought to be located would take merely a small strip on the south edge of the lands of the Government, entering and leaving such lands on the same side.

I am therefore of opinion that there is nothing in this act which affects the question submitted by you.

Accounts.

You will of course understand that this opinion is given upon the facts alone submitted in your letter and the accompanying papers.

Respectfully,

JUDSON HARMON.

The SECRETARY OF WAR.

ACCOUNTS.

The Dockery Act of July 31, 1894, chapter 174, does not require the Secretary of the Treasury to report to Congress the balances due on postal accounts for the past fiscal year.

DEPARTMENT OF JUSTICE,

January 23, 1896.

SIR: Section 12 of the so-called Dockery Act of July 31, 1894, chapter 174, relating to the rendition of public accounts to the auditors of the Treasury, provides that you may waive delinquency of the accounting officers in certain cases. The following provisions also are contained in the same section:

"And provided further, That this section shall not apply to accounts of the postal revenue and expenditures therefrom, which shall be rendered as now required by law.

"The Secretary of the Treasury shall, on the first Monday of January in each year, make report to Congress of such officers as are then delinquent in the rendering of their accounts or in the payment of balances found due from them for the last preceding fiscal year. Sections two hundred and fifty and two hundred and seventy-two of the Revised Statutes are repealed."

Your communication of January 20 asks my official opinion whether you are required to report to Congress the balances due on postal accounts for the past fiscal year. I think that this question should be answered in the negative.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

Accounts—Transportation of Enlisted Men of the Navy—Statutory Construction.

**ACCOUNTS—TRANSPORTATION OF ENLISTED MEN OF THE
NAVY—STATUTORY CONSTRUCTION.**

The methods adopted in settling accounts for transportation of the Army under the act of March 3, 1879, chapter 183, are not applicable to accounts for the transportation of enlisted men of the Navy and Marine Corps.

An omission by Congress of some accounts from an act providing for the settlement of certain accounts for transportation shows that it was not the intention of Congress to make said act apply to all accounts for transportation furnished under preceding acts.

DEPARTMENT OF JUSTICE,

January 24, 1896.

SIR: I have examined the question which you submit to me by your letter of 22d instant and have the honor to give my opinion thereon as follows:

The question is, "Whether or not the methods adopted in settling accounts for transportation of the Army under the act of March 3, 1879, should not be regarded as applicable to accounts for the transportation of enlisted men of the Navy and Marine Corps."

As you very properly put it, the act of March 3, 1879 (20 Stat., 420), dealt only with the settling of accounts—a mere matter of bookkeeping. It provides that the act shall in nowise affect rights or duties under existing laws. The opinion of the Attorney-General, to which you refer (20 Opin., 11), related to the construction of the acts which created rights and duties. It held that the provisions of those acts that railroad companies to which the Government has furnished aid in construction, shall "transport mails, troops, and munitions of war, supplies and public stores," included the transportation of marines and seamen enlisted in the Navy as well as officers and men belonging to the Army, both being intended to be included in the word "troops."

The act of March 3, 1879, however, applies in terms only to accounts "for transportation of the Army and transportation of the mails." While it may be doubtful whether accounts for the transportation of "munitions of war" come under this act, it is clear that accounts for transportation of "supplies and public stores" do not, so that Congress omitted

Contributions for Political Purposes.

from the accounts covered by the act of March 3, 1879, some accounts for transportation of articles under previous laws. The only possible theory upon which it could be held that accounts for transportation of the Navy were intended to be included in the expression "transportation of the Army," would be that the clear intention was to make the act of March 3, 1879, apply to all accounts for transportation furnished under preceding acts. That possibility is taken away by the undoubted omission of some accounts, so that, in my opinion, the act does not apply to accounts for transportation connected with the Navy.

While there is no apparent reason for this discrimination on the part of Congress, I see no escape from the conclusion I have expressed as to the meaning of the language which Congress has employed.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE NAVY.

CONTRIBUTIONS FOR POLITICAL PURPOSES.

An agent of the Government who receives money to pay secret agents is not guilty of either receiving or being concerned in receiving a contribution for a political purpose, within the meaning of the act of January 16, 1883, chapter 27, where he received and honored an order from one of said secret agents to pay money out of the next remittance he should receive to a person not in the Government service as a contribution in aid of a political campaign, it appearing that said agent had nothing whatever to do with soliciting, inducing, or causing said secret agent to give the order, and had no relation or connection with the person to whom he paid the money, and had no concern in or control over the money after it was so paid, although he knew for what purpose it was paid.

Said act does not forbid voluntary contributions for political purposes by persons in the employ of the Government, but protects such persons from solicitation or coercion with respect to such contributions.

DEPARTMENT OF JUSTICE,

January 25, 1896.

SIR: I have the honor to give my opinion upon the question which you submit in your letter of 23d instant with relation to the case of W. M. Bellman, an agent of your Department,

Contributions for Political Purposes.

against whom the Civil Service Commission have filed a charge upon which you are required to act.

It appears from your statement that prudential reasons have led you to adopt a peculiar system with regard to secret agents. Instead of receiving their pay directly from your Department they receive it from postmasters in designated cities. Those postmasters send the money in envelopes by express to one of these agents located in the Department at Washington for that purpose, whose duty it is to reship these packages by express to the various agents at the points where they may happen to be. Bellman was the agent detailed for this service. The established practice was for the agents to send orders to Bellman to open the envelopes so received by him directed to them, and make payments out of the money therein to their families, creditors, etc., which he did. One of the agents on duty at Chicago sent an order to Bellman at Washington to pay \$50 out of the next remittance he should receive to a person in Washington not in the Government service. Bellman honored the order and paid the money accordingly at the private office of this person.

It is clear from your statement, which is based upon the transcript of evidence which accompanied your letter, that Bellman had nothing whatever to do with soliciting, inducing, or causing the agent in Chicago to give the order, and had no relation or connection whatever, direct or indirect, with the person to whom he paid the money, and no concern in or control over the money after it was so paid. Bellman's relation to the transaction was as purely mechanical as that of a banker who simply pays the check of a depositor.

It appears that the money was a contribution by the agent in Chicago in aid of a political campaign which the party to which he belonged was conducting in one of the States, and that this fact was known to Bellman when he received and carried out the order. The charge is that Bellman's action was a violation of sections 11, 12, 13, 14, and 15, or of one or more of them, of the act "to regulate and improve the civil service of the United States." (1 Supp., 392.)

It is well settled that the intention of this act was not to forbid voluntary contributions for political purposes by persons in the employ of the Government, but to protect such

Contributions for Political Purposes.

persons from solicitation or coercion with respect to such contributions. Knowing the difficulty of detecting the actual operation of means and influences whose employment had become a public evil, Congress absolutely prohibited the solicitation or receipt of political contributions by all persons in the Government service in any place or in any way, and forbade such solicitation or receipt by any person in any room or building occupied in the discharge of official duties. All who are in the Government service are thus protected against the possibility of actual coercion and from that of the coercion implied in the relation of the person soliciting or receiving to the Government or implied in solicitation or receipt in a public office; but Congress did not attempt to prohibit solicitation by or payment to persons not in the Government service otherwise than in Government offices. The agent in Chicago therefore had a right to make the contribution to the person in Washington, either with or without the solicitation of such person; and if the agent had himself taken the money to such person no question would have arisen.

Sections 13 and 14 of the act clearly have no bearing whatever upon the question of Bellman's conduct. The only question is whether he received or was concerned in receiving a political contribution in violation of sections 11 and 12. Section 12 may be laid aside for the purpose of the inquiry, because, as Bellman was in the public service, the place where he received the contribution, if he received it at all, is quite immaterial.

Bellman's action must therefore be judged by section 11 alone. I can not see how it can fairly be said that it was a violation of the provisions of this section. It is admitted that he did not solicit the contribution. Nor can it be said, in any proper sense of the term, that he received it. He physically took the money from the package, but he did so merely as the agent of the owner, and so long as it remained in his possession he held it as the agent of the owner, who had a right at any time to revoke his order and reclaim the money. This right continued until Bellman actually handed the money over to the third person, who alone can be said to have received it. When he received it it was from the secret agent in Chicago by the hand of Bellman and not from

Duties.

Bellman. He was accountable to the agent in Chicago and not to Bellman for its use or misuse. Bellman had no more to do with the transaction than a mere messenger would have had to whom the owner had handed it for delivery. The receipt of money, etc., intended by the statute is acceptance of possession which confers a right of disposal, not possession which simply constitutes the taker a mere custodian without right on his own behalf or that of others.

The phrase "in any manner concerned in soliciting or receiving" was intended to cover evasions of the purpose of the statute and to punish all persons for whom or on whose behalf or at whose instance the person actually receiving the money is acting. Your statement excludes all relation whatever on the part of Bellman to the transaction other than the mere physical one which I have already described. In my opinion he was not guilty of either receiving or being concerned in receiving a contribution for a political purpose within the meaning of the act in question.

Very respectfully,

JUDSON HARMON.

The POSTMASTER-GENERAL.

DUTIES.

Books imported for the purpose of sale to any customers who may apply are dutiable under the tariff act of 1894.

DEPARTMENT OF JUSTICE,

February 3, 1896.

SIR: Answering your communication of January 31, I have the honor to say that, in my opinion, books imported for the purpose of sale to any customers who may apply are not free of duty under paragraph 413 of the tariff act of August 27, 1894, even though imported to take the place of books which had been previously imported by the same person, and upon which duties had been paid by him, and which he had afterwards sold to a State library.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

Option—Shiloh Battlefield.

OPTION—SHILOH BATTLEFIELD.

A contract of option for the sale of certain lands to certain officers of the Shiloh Battlefield Association considered and held not to constitute a very serious cloud upon the title to the land referred to.

DEPARTMENT OF JUSTICE,

February 3, 1896.

SIR: I have the honor to acknowledge the receipt of your communication of January 17, with inclosures as stated, all of which are herewith returned.

Referring to the contract of option of 22d of December, 1893, from H. Duncan and J. R. and S. B. Duncan, by which they "agree to sell to John A. McClernan, president, E. T. Lee, secretary, and J. W. Colman, treasurer, of the Shiloh Battlefield Association, certain land therein referred to," you request that I advise you "if this option would, in point of law, be considered valid and a sufficient cloud upon the title to preclude a purchase by the Government, supposing such purchase be consummated prior to the expiration of the option. In other words, can these options be disregarded, supposing that mutual agreements as to price be entered into satisfactory to the United States and to the owners, and supposing always that the titles are good in all other respects?"

I have examined all of the exhibits accompanying your letter and have considered what I understand to be the subject upon which you desire my advice, and beg to reply as follows:

The contract of option—a copy of which accompanies the letter of Cornelius Cadle of January 8, 1896, addressed to you, and one of the exhibits with your letter—does not, in my opinion, constitute any very serious cloud upon the title to the land referred to in it. It is hardly clear and explicit enough in its description of the land to put a purchaser upon notice.

It stipulates for waiver and conveyance of homestead and dower, when the wives of the vendors are not parties to the agreement.

Option—Shiloh Battlefield.

It purports to have been duly admitted to record in the clerk's office of the State court, when, so far as it appears on its face, it has not been duly acknowledged by the vendors and is not attested by witnesses as to either of the vendors, and appears further to have been executed by a partnership firm.

In addition to this, Mr. E. T. Lee, who appears from the exhibits with your letter to be the obdurate and recalcitrant party to the transaction, was not acting in his own rights in obtaining these options, but for the Shiloh Battlefield Association, of which he was secretary.

It must be that the association, then, in its corporate or partnership character, as the fact may be, is the only person who could assert a claim under this contract of option; and Mr. E. T. Lee must look to that association for the amount of his personal claim for services which he asserts in one of his letters.

If all the contracts of option for these lands are like in form to the one submitted in your letter, I do not think that they afford ground to justify serious apprehension of loss to the Government by disregarding them altogether.

It would seem, however, especially in view of the recent decision of the Supreme Court in the Gettysburg cases, that the most convenient and economical course for the Government to pursue to obtain title to so much of these lands as may be desired would be by proceedings for condemnation in the Federal courts for the judicial district in which the land lies; and such proceedings may well be instituted after the 4th day of March, 1896, on which date all the contracts for option referred to expire.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JUDSON HARMON.

The SECRETARY OF WAR.

3513—VOL 21, PT 2—7

Supplies—Contracts.

SUPPLIES—CONTRACTS.

Contracts for the purchase by the Government of seals used to secure packages entered for transportation in bond must be awarded upon advertisement.

It is unlawful for the head of an Executive Department to make a contract for such supplies for a longer term than one year from the time the contract was made.

Locks and seals used to secure packages while being transported in bond, paid for and owned by common carriers, are not required to be purchased upon advertisement.

DEPARTMENT OF JUSTICE,

February 5, 1896.

SIR: I have the honor to acknowledge the receipt of your letter of January 24, 1896, requesting an opinion as to whether or not certain fastenings for bonded cars, and packages entered for transportation in bond, are such supplies as are governed by section 3709, which provides for awarding contracts upon advertisement.

It appears from your letter that seals used to secure packages in transportation are purchased and paid for by the Government.

As to these, I think there can be no question that section 3709 applies, and also section 3735, which makes it unlawful for any Executive Department to make a contract for supplies for a longer term than one year from the time the contract was made.

It appears from your letter that locks and seals used for securing cars are paid for by the common carriers.

The purpose sought by section 3709 was to give the Government the advantage of competition in prices.

The locks and seals for securing the cars never become the property of the Government.

While sections 3001 to 3007, inclusive, Revised Statutes, and the act approved June 10, 1880 (21 Stat., 173), and section 2998, Revised Statutes, referred to in your letter, contemplate and authorize that bonded goods in transportation shall be secured by seals and locks, there is nothing requiring that the seals and locks shall be furnished by the Government.

The object is to prevent the perpetration of frauds upon

Secretary of War—Navigable Waters of the United States.

the Government during transportation, and this is to be accomplished under the rules and regulations of the Treasury Department providing for proper fastenings.

If, by contract with the common carriers, the expense of these fastenings can be saved to the Government, I see no reason why it should not be done.

They are at all times under the control of the officers of your Department.

The conclusion that these locks and seals are supplies within the meaning of section 3709 would carry with it the necessary result that they must be paid for by the Government, for that section certainly was not intended to apply to what the Government did not purchase and own.

I am therefore of the opinion that section 3709 does not apply to fastenings paid for and owned by common carriers.

Respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

SECRETARY OF WAR—NAVIGABLE WATERS OF THE UNITED STATES.

It is the duty of the Secretary of War to act upon a petition to have designated the portion of a river within which refuse matter may be discharged, in accordance with the provisions of the act of August 18, 1894, ch. 299, sec. 6, although the navigability of the river will not be affected.

The Secretary of War, in deciding this question, should be governed only by considerations affecting the navigation of the river, or which may affect future navigation.

DEPARTMENT OF JUSTICE,

February 12, 1896.

SIR: I have the honor to acknowledge the receipt of your letter of February 8, 1896, in which, after setting out section 6 of the river and harbor bill (28 Stat., 363), you say:

“New River in Virginia is a ‘river of the United States, for the improvement of which money has been appropriated by

Secretary of War—Navigable Waters of the United States.

Congress,' and the Crozier Iron Company and others have located on and near it extensive mining and ore-washing industries, to maintain and carry on which it is necessary to discharge into the river large quantities of ore-washing; a material of such a character that it is conceded to be a violation of the said section of law to discharge it into the river 'elsewhere than within the limits defined and permitted by the Secretary of War.'

"And the owners of the industries mentioned have petitioned the War Department to designate a portion of the river as 'limits defined and permitted by the Secretary of War,' within which they may discharge ore washings into the river without violating the provision of law referred to. But it has been determined by investigation and report of the Chief of Engineers that the discharge of the ore washings into the river does not and will not affect the navigability of the river, and that therefore the navigation interests are not concerned in the matter of a portion of the same being designated as they request. And your opinion is desired as to whether, in view of the fact that the navigability of the river is not and will not be affected by discharging the ore washings into the stream, and that therefore the navigation interests are not concerned, it is the duty of the Secretary of War to take action in the premises, and to either decide against the petitioners and reject their application, or decide in their favor and designate a portion of the river, accordingly as the merits of the case may appear to him—that is, is it the duty of the Secretary of War to act on every petition presented under the circumstances involved in this case, or is it only his duty to act in cases in which the interests of navigation will be affected?

"Now, while the navigability of the river would not be affected if the prayer of the petitioners should be granted, and the navigation interests are therefore unconcerned as to whether it is granted or not, interested parties are urging that it should not be granted because, as it is claimed, the discharge of the ore washings into the river destroys the fish, pollutes the water so as to destroy its usefulness for domestic purposes, and injures the scenery along the stream. And in case you determine that it is the duty of the Secre-

Secretary of War—Navigable Waters of the United States.

tary of War to act on the petition, your opinion is requested as to whether it is his duty to take into consideration, in deciding the matter, only the interests and importance of the mining and ore-washing industries and navigation and the navigation interests, and decide in favor of the petitioners and designate a portion of the river when he finds that this will not injuriously affect navigation to a greater extent than, in his opinion, the interests and importance of the mining and ore-washing industries warrant, or whether it would be proper for him to also take into consideration the matter of the discharge of ore washings into the river injuriously affecting the fish and the water of the stream and the scenery along the same, and decide to grant the petition or not accordingly as he found the merits of the case to be with these things considered along with the others mentioned above."

Section 6 is as follows:

"That it shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the waters of any harbor or river of the United States, for the improvement of which money has been appropriated by Congress, elsewhere than within the limits defined and permitted by the Secretary of War." * * *

First. I am of the opinion that it is your duty to act upon the application.

If you should decline to act in this and similar cases the above section would operate as an absolute prohibition.

This was not the intention of Congress. The fact of lodging a discretion with the Secretary of War clearly shows that the prohibition is to be removed when it is not necessary to effect the purposes contemplated by Congress in the exercise of the power conferred upon it by the Constitution.

Second. The discretion given to the Secretary of War is very broad, and no principles governing it are declared. There is no appeal from his action. These facts impose the obligation of a careful scrutiny of the considerations which should control his judgment.

Public Works—Secretary of War.

The jurisdiction of Congress over New River, so far as this question is concerned, is based alone upon the power to regulate commerce between the States, and it must be assumed, notwithstanding the broad language used in the act, that Congress has not sought to exceed its powers.

If Congress had passed a statute to protect the fish or scenery of New River, or the purity of its water, if it bore no relation to navigation, and to that end had prohibited the acts referred to in your letter, its invalidity would be conceded, because these are subjects which belong to the States alone.

As Congress could not directly legislate for these purposes, it could not and has not sought to reach them indirectly through the discretion committed to you.

You should, therefore, be governed only by considerations affecting the navigation of the river, and if there be none now, then by considerations which may affect future navigation, whether it is likely to become important or not, which Congress must be presumed to have had in mind in authorizing the frequent and large expenditures which have been made in the improvement of the river.

Respectfully,

JUDSON HARMON.

The SECRETARY OF WAR.

PUBLIC WORKS—SECRETARY OF WAR.

If in the judgment of the Secretary of War justice either to the Government or to the contractors on the works at the South Pass channel of the Mississippi River requires him to determine the actual height of average flood tide as a datum of measurement, he has the right to determine such height.

DEPARTMENT OF JUSTICE,

February 13, 1896.

SIR: I have the honor to give my opinion upon the matter submitted by your letter of December 2, viz, "the application of the executor of the estate of James B. Eads for readjustment of the datum plane of average flood tides to which the soundings in the channel at the South Pass Jetties are referred by the inspecting officer."

Public Works—Secretary of War.

By the act of March 3, 1875 (18 Stat., 463), Eads was "to construct such permanent and sufficient jetties and such auxiliary works as are necessary to create and permanently maintain, as hereinafter set forth, a wide and deep channel between the South Pass of the Mississippi River and the Gulf of Mexico." He was to secure a navigable depth of 20 feet of water through the pass within thirty months, and an additional depth of not less than 2 feet during each succeeding year thereafter. He was to receive \$5,250,000 "for constructing said works and obtaining a depth of thirty feet in said channel, and the annual sum of one hundred thousand dollars for each and every year that said depth of thirty feet shall be maintained by the jetties and auxiliary works aforesaid in said South Pass during twenty years after first securing the said depth."

Payments were to be made on certified statements of an engineer officer to be detailed by the Secretary of War, reporting the depth of water and width of channel secured and maintained from time to time. Partial payments, aggregating \$4,250,000, were provided for when certain depths of channel should be produced and maintained, and "when a channel thirty feet in depth and three hundred and fifty feet in width shall have been obtained by the effect of said jetties and auxiliary works aforesaid the remaining one million dollars shall be deemed as having been earned." But this amount was to be retained as security, interest at 5 per cent per annum being payable semiannually "from the date when a channel of thirty feet in depth and three hundred and fifty feet in width shall have been first secured."

Further, after securing the said channel, \$100,000 per annum was to be paid in equal quarterly payments every year that it should be maintained by the effect of said jetties and auxiliary works for a period of twenty years. At the end of the first ten years one-half of the \$1,000,000 retained was to be paid, and the other half at the end of the second ten years, "the said channel of thirty feet in depth and three hundred and fifty feet in width having been maintained" continuously during such periods.

The Government reserved the right to pay the sum so reserved at any time, thereby terminating its liability for

Public Works—Secretary of War.

interest and Eads's liability for the maintenance of the jetties, but has never exercised this right.

The Chief of the Coast Survey was directed to cause a careful topographic and hydrographic survey to be made of said pass and bar and submit the same to the Secretary of War, "in order to facilitate the proper location of said jetties * * * and to correctly determine such effects as may be produced by them." The results of such surveys were to be furnished to Eads.

At the end of the recital of the various depths of channel which were to entitle Eads to the partial payments amounting to \$4,250,000 is this clause: "The respective depths and widths of channel being measured at average flood tide, as ascertained and determined by the Secretary of War." But while no directions are given for measurements during the period of maintenance, the only fair construction is that they were to be made in the same manner.

It was made the duty of the Secretary of War to report payments and all important facts relating to the progress of the works, their character and permanency, to the end that Congress might be kept fully advised as to the faithfulness and efficiency with which the works were being executed, "it being expressly understood that while said Eads shall be untrammelled in the exercise of his judgment and skill in the location, design, and construction of said jetties and auxiliary works, the intent of this act is not simply to secure the wide and deep channel first above named, but likewise to provide for the construction of thoroughly substantial and permanent works by which said channel may be maintained for all time after their completion."

The act of March 3, 1879 (20 Stat., 376), made some slight changes as to the payment of the installments, its relevant provisions being as follows:

"When a channel thirty feet in depth, without regard to width, shall have been obtained through the jetties, there shall be paid five hundred thousand dollars; and the one million dollars provided for by the hereinbefore recited act to be paid by the United States in ten and twenty years shall be earned by said Eads and his associates, and the same, with interest, shall be paid to said Eads or his legal

Public Works—Secretary of War.

representatives at the times and in the manner provided by said act.

"The one hundred thousand dollars per annum provided by said recited act to be paid to said Eads and his associates during a period of twenty years shall be paid at the times and in the manner therein provided, upon the maintenance by said Eads and his associates of a channel through the jetties twenty-six feet in depth, not less than two hundred feet in width at the bottom, and having through it a central depth of thirty feet without regard to width."

The jetties and other works were completed, the required depth of channel was produced and has been maintained, Eads receiving the stipulated yearly payments.

The present application is based upon the alleged fact that the average flood tide is now, and has been for several years, about 1 foot higher than the plane established in 1875, and that the use of the plane so established as a datum necessitates the maintenance of a channel 1 foot deeper than was contemplated by the law, resulting in needless additional expense, delay of payments, and loss of interest.

From the letter of General Craighill, Chief of Engineers, which you inclose, it appears that when the height of average flood tide was ascertained in 1875 bench marks and a gauge were established as a basis for future measurements; but from the reports of the officers in charge of the measurements it appears "that at the present time and for several years past the reading on the United States official gauge at Port Eads of the plane of mean high tide has been about 1 foot higher than it was in 1875."

The Chief of Engineers states that "the plane of high tide *as indicated by the gauge* is unstable, the curve of changes has not been regular, and, while uniformly higher, at times recedes, having at the present time a downward tendency. These changes must result from changes in the level of the Gulf tides, the tendency being higher, or from a general subsidence of the delta of the Mississippi, together with the gauge and bench marks to which it is referred. The only fact which can now be particularly stated is that the *elevation of the Gulf level as referred to the gauge and established bench marks has changed since 1875.*"

Public Works—Secretary of War.

It is not clear, according to the statement of the Chief of Engineers, whether the change is a real or only an apparent one, the increased reading on the gauge being due, as claimed by some, to a general subsidence of the delta together with the gauge and bench marks.

The only question is, whether in either case, viz, that of an actual change in the height of average flood tide, or that of a disturbance of the bench marks by which its height in 1875 was indicated, you have authority, for the purpose of present and future measurements, to ascertain the actual average height of flood tide for the time being.

In the latter case your authority is undoubted. It certainly was not intended that an artificial mark should be substituted for a natural level and adhered to at all events.

In the former case your authority is the same. I find nothing in the law which fairly justifies the construction that when once the height of average flood tide was ascertained, for the purpose of determining whether the channel provided for had been produced, that level should be adhered to during the subsequent period of maintenance, whatever might happen. Whether Congress did or did not contemplate the possibility of changes which might cause the average height of flood tide to vary does not appear, but it is plain that the object which it intended to secure was a certain depth of water in the channel at the average height of flood tide. And this object would not be certainly secured unless the obligations which Congress intended to impose and Eads to assume were to adapt his work to the actual situation, fixed if the situation remained the same, varying as the situation might change. In other words, it was a condition which was to be produced and maintained, not a specific work; a volume of water, not an artificial waterway.

Such being my view of the true construction of the acts in question, my opinion is that you have the right whenever, in your judgment, justice either to the Government or to the contractor so requires, to determine the actual height of average flood tide as a datum for measurement.

This view seems to be confirmed by the fact stated by the engineers, that while the height of average flood tide at the mouth of the pass is affected only by the natural ebb and

Unmailable Matter—Lottery.

flow of the waters of the Gulf, its height at the head of the pass is affected also by the state of the river and possibly other causes which introduce greater possibilities both of original inaccuracy and of subsequent changes.

The period to be covered by observations for the purpose of fixing the proper average depends on science, not on law; but it should be sufficiently long to include every phase of the situation as it is affected by the various causes which operate upon it.

As the surveys, measurements, and observations doubtless involve expense, I deem it proper to add that in my opinion you are authorized to require such expense to be provided for by the representatives of Eads when it is to be incurred on their application.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF WAR.

UNMAILABLE MATTER—LOTTERY.

The business of a certain company considered and determined to be in the nature of a lottery within the meaning of the United States statutes.

The name "lottery" covers any determination of gain or loss by the issue of an event which is merely contrived for the occasion.

DEPARTMENT OF JUSTICE,

February 24, 1896.

SIR: I have carefully examined the papers which accompany your letter of December 9, requesting my opinion with respect to your action in refusing use of the mails to various "bond and investment companies." Those papers included briefs of counsel for the companies and of the Assistant Attorney-General for your Department. I have also heard counsel and had briefs from them. I have the honor now to give my opinion as requested.

The statute (sec. 3929, as amended September 19, 1890, 26 Stat., 466) provides that "The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money or of any real or personal prop-

Unavailable Matter—Lottery.

erty, by lot, chance, or drawing of any kind," direct that registered letters directed to such person or company be withheld and returned to the senders, and that payment of money orders payable to such person or company be refused.

By the act of March 2, 1895 (28 Stat., 964), these powers are "extended and made applicable to all letters or other matter sent by mail."

These acts were within the constitutional authority of Congress, and empower you to deny all mail facilities to those whom you may find to be engaged in any of the classes of business described. (*Ex parte Jackson*, 96 U. S., 727; *In re Rapier*, 143 U. S., 110.)

Your remaining question is whether the business conducted by the companies you name, as it is disclosed by the evidence before you, comes within the description given by the statute.

I have chiefly considered the case of "The Pettis County Bond and Investment Company," of Sedalia, Mo., that being the first one you name, the one which has been most heard, and the one which presents what is claimed and appears to be the strongest case. I shall therefore give my opinion upon that case only, believing that it covers all the others. If you think it does not, I shall be glad to consider any to which you may call my attention.

The question presented has twice been the subject of opinions by my immediate predecessor (20 Opin., 748, and 21 Opin., 4), who in each case concurred in the conclusions which the Assistant Attorney-General for your Department had reached after careful study and exhaustive research. I can see no difference in principle between the case now presented and those covered by the opinions just cited. In fact, all companies of this class are alike in their general design and differ only in details and methods. The design is to induce subscriptions for bonds by holding out the chance of receiving large sums for small payments, the chance depending on the numbering of the bonds. The schemes for determining the fortunate numbers vary, and so do the terms in which the bonds and coupons express the undertaking of the companies; but it can not be fairly denied that, without the ever present chance of speedily getting much for little, not one of these companies would attempt to do business or succeed in the attempt if made.

Unavailable Matter—Lottery.

While the forms of legitimate investment are carefully presented, they alone would not tempt the most unwary. I do not mean that they are necessarily intended to deceive, because they must be known by the public generally, as well as by the promoters, to be designed merely as a legal pretext or background for the schemes of chance in which it is the immediate and primary object to engage. That the intention is generally to carry out fairly those schemes as proposed and understood need not be denied; but this does not relieve them from legal condemnation.

The Pettis County Company issues a bond for \$1,000 upon payment of \$10 and an agreement to pay \$3 monthly until the four coupons which accompany the bond are all paid. The solicitor receives \$9 commission out of the first payment. The remaining \$1 and the monthly payments are divided among expense, redemption, and reserve funds. The bond has four coupons, numbered 1 to 4, each calling for \$250, and bonds are numbered serially as issued.

These coupons are payable in the order determined by the application to the numbers of the bonds of a rule partly serial and partly multiple, thus: 1, then 4; 2, then 8; 3, then 12, etc. A table showing, as an example, the operation of the rule up to 400, provided bonds bearing all the numbers are outstanding, is printed on the back of each bond. Except in the rule adopted to determine the order of payment, this plan does not materially differ from those of the myriad of such companies which were springing up all over the country until they were checked by your action in refusing them the use of the mails. As no subscriber could know what number his bond would bear when issued, he would simply take the chance, in paying his \$10, of receiving a bond which would soon yield him \$250 at the expense, necessarily, of the unlucky bondholders. This is so clearly a mere scheme of chance in the nature of a lottery, and has been so often held to be such by the courts, that it would be a waste of time to discuss it.

In order to avoid this ruling, made in its own case, as I am advised, this company changed the form of its printed application, so that instead of paying the \$10 at the time of signing, the subscriber merely agrees to pay it if the bond is satisfactory when delivered and examined. It is now claimed

Unmailable Matter—Lottery.

that the subscriber takes no chance whatever because he does not embark in the scheme, unless he sees from his bond when presented that it bears one of the numbers which entitle its coupons to payment early enough to suit his views of expected gain.

This is ingenious and specious enough, no doubt, to induce subscriptions by the unthinking. At any rate, the company is eager to make the attempt, though it is not willing to eliminate the preferred coupon feature. But it is manifest that if every subscriber, by merely comparing the number on his bond with the order of numbers printed on the back of it, could tell with any approach to certainty the order in which his coupons would be reached for payment, nobody would take the bonds which are to be passed by; and unless these are taken there is an end of the business. One might as well try to run an ordinary lottery without blanks as such a preference investment scheme without any unpreferred. Some must lose what others gain. It is manifest upon the slightest reflection that, as all the subscribers have the same right of rejection upon the presentation of the bonds, and the numbers are given upon issuance for presentation, no subscriber can possibly tell how many of the bonds bearing lower numbers than his own are really outstanding when his bond is presented. So that it may justly be said that the change has made the chance feature of the scheme worse rather than better, because if the elements of uncertainty are not in fact increased they are given a fictitious appearance of certainty.

It appears that although this company has a capital of only \$2,000, \$100,000 in bonds have been deposited for it as required by a law of Missouri from insurance and other companies. This was, of course, done by its promoters and shows their faith in the profitableness of the scheme. But if it be conceded that this deposit is available to subscribers, whether to those who realize the profit which all hope for, or those, if such there should ever be, who keep up their payments to the end and thereby escape the forfeiture which follows any default, this does not affect the inquiry as to the real nature of the company's business. A lottery is none the less a lottery because it is fairly conducted or because such conduct is amply secured.

Unmailable Matter—Lottery.

It is claimed that actuarial computation shows that the "reserve fund" will be sufficient to pay off the unpreferred bonds at their maturity. Investment at a high rate of compound interest, without any allowance whatever for loss of time or other loss, is assumed in the calculation. But assuming its correctness, the lottery nature of the scheme does not disappear, because it is incredible that without the chance thereby afforded anyone could be found to pay money into such a company for twenty years without return. The coupling of a sale or other ordinary transaction with a scheme of chance does not save it from legal condemnation. This is a very common device.

It has been urged that the "investments" offered by these companies do not differ in principle from insurance, and are in fact "fairer and better because the bondholder does not have to die or lose his property to realize them." The fallacy consists in confusing mere chance with uncertainty. One's property may not burn at all, and the time he will die is not known; but neither event depends upon mere chance, and the law therefore recognizes contracts contingent upon them while it does not countenance lotteries. Yet the argument advanced applies as well to lotteries as to the preference feature of the business of this company. If the prizes in lotteries had been made to depend upon the happening of some serious event to which all persons are liable, it is quite likely that the law respecting lotteries would not be as it is. But the name "lottery," which originally implied casting lots, now covers any determination of gain or loss by the issue of an event which is merely contrived for the occasion.

It is said, also, that as one of the features of these "investments" is that the bondholders who persist gain advantage from the forfeiture of the bonds of those who fail in their payments, the case presented is the same as that of insurance on the "tontine" plan. If one of these companies should eliminate the preference in payment of coupons to be determined by the mere holding of a lucky number, this question might arise. But the chance of preference lies among bondholders of equal standing in all respects. The fact that the prospects of all who continue to pay are improved by the dropping out of holders of bonds bearing lower numbers

Furloughs—Regulations.

does not eliminate the element of mere chance, and therefore does not alter the case.

The principle of survivorship involved in tontine insurance has been the subject of doubt and discussion because, in its simple form, it has been claimed to be mere wagering among the members on the length of their lives. But it involves no lottery element. If, however, to a series of tontine endowment policies a scheme should be added for paying some of them before maturity, according to the determination of any form of hazard, we should have a partial analogy to the present case. But the argument would fail because no such system has ever been held or admitted to be lawful.

In my opinion the Pettis County Company comes within the terms of the statutes, and all other companies which promise payments to part only of a class, who all stand on an equal footing, leaving the selection to depend on any rule of hazard, whether such payments constitute the entire scheme of their business or are connected with other features which would not, by themselves, be objectionable.

Respectfully submitted.

JUDSON HARMON.

The POSTMASTER-GENERAL.

FURLOUGHS—REGULATIONS.

It is not necessary for the Secretary of Agriculture to give a notice of furlough without pay of assistant microscopists over his official signature in each individual case when their services are not required.

A general order, signed by him, directing inspectors in charge of assistant microscopists to furlough them without pay when their services are not required will be sufficient.

DEPARTMENT OF JUSTICE,

February 24, 1896.

SIR: I have the honor to acknowledge the receipt of your letter of February 18, 1896, in which, referring to assistant microscopists being furloughed by you without pay, you say:

“I would request an opinion from your office as to whether it is necessary for me to give a notice of furlough over my official signature in each individual case, or will a general order, signed by me, directing inspectors in charge of assistant microscopists to furlough them without pay when their services are not required be sufficient?”

Furloughs—Regulations.

"In view of the fact that the active employment of the assistant microscopists depends upon the orders received by the packing houses, it was impossible to tell more than a few days ahead when their services would be required, and it is much more convenient to direct the inspector in charge to furlough without pay when necessary. It would be almost impossible for me to give individual furloughs in each case unless I sent to inspectors blank furloughs, signed, for them to fill in with the name and time."

In *United States v. Murray* (100 U. S., 537), it was held, where a clerk in the Treasury Department was furloughed against his remonstrance, that "there is nothing to prevent the Secretary from putting him on furlough without pay at any time, if the exigencies of the service require it. He may be dismissed absolutely, and it is difficult to see why, if this can be done, he may not be furloughed without pay, which is in effect a partial dismissal. If he desires to be free from all obligations to serve in the future he may resign; but if he permits his name to continue on the rolls it must be on such terms as are imposed by the Department."

Your right to furlough can not be questioned.

Inasmuch as the contingencies upon which it is desirable to furlough microscopists arise from time to time and upon conditions which you can not foresee nor control, the advantages to the Government of this system would be largely sacrificed if you are compelled to act personally in each individual case, and after the occasion has arisen. I am of the opinion that you can make general regulations, under which your subordinates in charge of particular localities can, as circumstances call for such action, furlough microscopists, to take effect at once, reporting their action to you.

I suggest that you employ microscopists who may have intermittent work, with the understanding that the employment is only from time to time as their services may be needed, and that the furlough system is for their benefit and to avoid a formal discharge, and employment from time to time.

Respectfully,

JUDSON HARMON.

The SECRETARY OF AGRICULTURE.

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Duties—Attorney-General—Libel.

DUTIES.

The Secretary of the Treasury has no power to refund penal duties which have been paid into the Treasury on the ground that they were incurred without willful negligence or an intention of fraud on the part of the importer.

DEPARTMENT OF JUSTICE,

March 13, 1896.

SIR: Answering your communication of February 4, asking my official opinion as to your power to refund penal duties which have been paid into the Treasury under the provisions of section 7 of the customs administrative act of June 10, 1890, chapter 407, I have the honor to say that section 20 of the antimoietty act of June 22, 1874, chapter 391, to which you refer me, confers, in my opinion, no power to refund any duties, penal or otherwise. The cases in which you are authorized to refund duties were described in the opinions of this Department rendered September 21 and November 8, 1895. I can find no statutory authority to refund penal duties on the ground that they were incurred without willful negligence or an intention of fraud on the part of the importer.

I return herewith the opinions of the Solicitor of the Treasury and the Comptroller of the Treasury upon this question.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL—LIBEL.

An opinion given by the Attorney-General, which under the uniform practice of the Attorneys-General of withholding any expression of opinion on a mere moot question until a case has actually arisen, he might with entire propriety have declined to give.

Any publication in an official circular of the ground upon which an employee of the Government has been suspended or discharged from the public service will not support a cause of action for libel against the officers making such publication, provided it was made in good faith, without malice, in the performance of official duty, and with the design only of promoting the public interests.

DEPARTMENT OF JUSTICE,

March 14, 1896.

SIR: I have the honor to acknowledge receipt of your letter of the 6th instant, inclosing a "specimen of a monthly

Appropriation—Seeds.

circular issued by the Weather Bureau of the Department of Agriculture and distributed among its employees for the purposes of information and discipline." You invite my attention particularly to such portions of the circular as are marked in blue and ask my opinion whether "the printing and distribution of this circular might give cause for civil action against the Chief of the Weather Bureau for libel on the part of any person whose name appears on such circular."

Inasmuch as the circular has been already issued and distributed—and a cause of action, if any, has already accrued—I am unable to perceive precisely the object of your inquiry for my opinion; and, indeed, under the uniform course of practice observed by my predecessors in office, I might with entire propriety withhold any expression of opinion at all on a mere moot question until a case has actually arisen. But I may say for your information that any publication in an official circular of the ground upon which an officer or employee of the Government has been suspended or discharged from the public service will not support a cause of action for libel against the officer making such publication, provided it was made in good faith, without malice, in the performance of an official duty, and with the design only of promoting the public interests.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JUDSON HARMON.

The SECRETARY OF AGRICULTURE.

APPROPRIATION—SEEDS.

The appropriation which was made for the purchase of seed for the Agricultural Department, in accordance with the provisions of section 527 of the Revised Statutes, for the year 1896 is available for purchases made under joint resolution S. R. 43.

Said joint resolution authorizes and directs the purchase and distribution of seeds for the year 1896 according to the practice which had been followed by the Department of Agriculture up to the year 1895, and the Secretary of Agriculture is to inquire how the distribution has been made in previous years, and follow the same course. If it has varied from year to year, he has a discretion, which he is free to exercise, but it will be a discretion of choice and not to do or leave undone.

Appropriation—Seeds.

DEPARTMENT OF JUSTICE,

March 16, 1896.

SIR: I have the honor to give my opinion, as requested, upon the question submitted by your letter of 14th instant, whether, under joint resolution (S. R. 43) "authorizing and directing the Secretary of Agriculture to purchase and distribute seeds, bulbs, and so forth, as has been done in preceding years," you are "compelled to use any part of an appropriation which was made for the purchase of seed in accordance with the provisions of section 527 of the Revised Statutes."

You were advised, August 15, 1894 (21 Opin., 55), that the act making appropriations for your Department for the fiscal year 1895 did not authorize the purchase of any other seeds than those described in Revised Statutes, section 527; that is to say, seeds "rare and uncommon to the country or such as can be made more profitable by frequent changes from one part of our own country to another." You were further advised upon the same subject April 20, 1895 (id., 162). Acting under those opinions, you refrained from purchasing and distributing seeds, as had theretofore been done by your Department, on the ground that the seeds which had been distributed and those which you would be able to procure for distribution did not come within the description of seeds to which you are limited by section 527.

The manifest object of the joint resolution was to authorize and direct the purchase and distribution of seeds for the year 1896 according to the practice which had been followed by your Department before your action above mentioned. The word "rare," which is found in section 527, is omitted in the resolution and the word "valuable" only used. While it is an unusual manner of legislating to refer to previous practice only as the standard and measure for the official action directed, I see no reason for holding that the resolution is invalid or ineffective for that reason. You are thereby directed to "distribute valuable seeds for the year 1896, as has been done in preceding years." You are simply put to the inquiry how the distribution has been made in previous years, and required to follow the same course, so far as

Accounts—Mistake of Law.

practicable, for the year named. The resolution assumes that the course has been uniform in previous years. If it has varied from year to year you have a discretion which you are free to exercise, having in mind the general object of legislation on the subject, but it will be a discretion of choice and not a discretion to do or leave undone. In other words, the plain intent and effect of the resolution are to remove all question of the construction of previous legislation on the subject and direct you to distribute seeds for the present year as has, in fact, been done heretofore, whether strictly in conformity with law or not. This Congress unquestionably had the authority to do. If an amendment or suspension of existing legislation be involved, such amendment or suspension is accomplished by the resolution. The direction is mandatory and should be followed.

The object of the last part of the resolution was to remove all doubt as to your authority to purchase seeds for distribution without resorting to advertisement for bids, a question of such authority having been raised by you in the communication upon which the second opinion above cited was given. You are authorized and directed to make purchases for the current year in the open market at your own discretion, provided you do not pay more than a reasonable and fair price. The appropriation for the purchase of seed for the year 1896 is available for purchases which you make under the resolution.

Respectfully submitted.

JUDSON HARMON.

The SECRETARY OF AGRICULTURE.

ACCOUNTS—MISTAKE OF LAW.

A soldier should not be held accountable for money paid him in excess of the amount he was entitled to where such payment was made through a mistake of law on the part of the executive officers of the Government.

DEPARTMENT OF JUSTICE,

April 1, 1896.

SIR: I beg to acknowledge the receipt of the communication of Capt. Owen J. Sweet, Twenty-fifth Infantry, U. S. A.,

Accounts—Mistake of Law.

of February 23, 1896, to the Adjutant-General of the Army, "referring to a communication from the Adjutant-General's Office of date February 17, 1896, stating that the records on file in that office show Private Edward Langford, Company D, Twenty-fifth Infantry, to have been erroneously mustered for additional pay on account of continuous service in explanation of his action in mustering the soldier for \$4 per month additional pay since March 28, 1894, was by virtue of remarks on descriptive and assignment roll of the soldier to that effect and that the overpayment of \$231.13 will be entered as a stoppage on muster and pay roll of the company against the soldier and that the soldier will be mustered for \$2 per month for five years' continuous service as directed, etc.," which communication, by the indorsements thereon, appears to have been forwarded through regular channels to the Adjutant-General's Office of the War Department and by the Secretary of War referred to the Judge-Advocate-General of the Army, with the request that he return the paper, with an expression of his opinion as to whether or not, in view of all the circumstances of the case, the Secretary of War has the power to remove the stoppage on account of overpayment to the soldier of the amount of \$229.13 (to December 31, 1895); and by a further indorsement thereon presents the clear and well-reasoned opinion of the Judge-Advocate-General of the Army, supporting the conclusion expressed by him that the money so paid to Private Edward Langford in excess of the amount which that soldier was entitled to was made through a mistake of law on the part of the executive officers of the Government, for which the soldier should not be held accountable.

I fully concur in the reasoning and conclusion here expressed.

In Colonel Swayne's case (17 Opin., 448), Colonel Swayne accepted a commission as colonel of the Forty-fifth United States Infantry on the 10th September, 1866. From the time of his appointment as colonel to 31st August, 1867, when he was in terms mustered out of the service as major-general of volunteers, Colonel Swayne continued to draw the pay of major-general. The question presented for opinion was,

Accounts—Mistake of Law.

whether the Government was entitled to set off against his allowance for percentage increase so much of the pay received by him as major-general from the 10th September, 1866, the date of his acceptance of the appointment of colonel, to 31st August, 1867, when he was mustered out of the service as major-general of volunteers, as represents the excess of a major-general's pay over that of a colonel.

Mr. Brewster, Attorney-General, was "of opinion that upon principles of administrative policy which ought to be considered firmly established the settlements between Colonel Swayne and the accounting officers in the matter of his pay as major-general of volunteers are conclusive upon the executive department of the Government and can not be reopened in the way indicated."

John W. Pulliam, captain, assistant quartermaster, United States Army, filed a claim for service pay "under any and all laws allowing credit for cadet service at United States Military Academy." He was allowed \$583.09 on that claim. After that allowance was made the Supreme Court of the United States held all such allowances to be without the authority of law. Captain Pulliam afterwards filed a claim for longevity rations and increased pay. It was proposed to set off against the amount to which he was justly entitled the sum which had been improperly paid to him. Mr. Miller, Attorney-General (19 Opin., 439), held, following the rule in *Lamborn v. County Commissioners* (97 U. S., 185), that "a voluntary payment made with a full knowledge of all the facts and circumstances of the case, though made under a mistaken view of the law, can not be revoked, and the money so paid can not be recovered back;" that "the settlement in Captain Pulliam's case can not be reopened upon the ground that it proceeded on a mistaken view of the legislation governing the subject involved."

I am clearly of opinion that the rule of law thus invoked and applied for the relief of educated and experienced officers of the Army should apply *a multo fortiori* for the relief of an ignorant and unlettered private soldier who had no part whatever in the statement of the accounts which resulted in the balance paid to him and who appears to have been paid

Duties.

such balance without any demand or application on his part for it.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JUDSON HARMON.

The SECRETARY OF WAR.

DUTIES.

The operation of section 23 of the customs administrative act is not confined to damaged goods.

It is not the intent of Congress that the United States should in any case exact as duties an amount greater than the value of the property imported.

DEPARTMENT OF JUSTICE,

April 10, 1896.

SIR: I have the honor to acknowledge your communication of March 31, 1896, asking my official opinion as to the construction of section 23 of the customs administrative act of June 10, 1890, chapter 407, which is as follows:

“That no allowance for damage to goods, wares, and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon; but the importer thereof may, within ten days after entry, abandon to the United States all or any portion of goods, wares, and merchandise included in any invoice, and be relieved from the payment of the duties on the portion so abandoned: *Provided*, That the portion so abandoned shall amount to ten per centum or over of the total value or quantity of the invoice; and the property so abandoned shall be sold by public auction or otherwise disposed of for the account and credit of the United States under such regulations as the Secretary of the Treasury may prescribe.”

You ask me whether an importer of goods, no part of which is damaged, may be relieved from the payment of the duties on any portion (not less than 10 per centum in value or quantity) of his invoice by abandoning it to the United States. In my opinion the operation of this section is not

Navy—Contracts of Minors—Statutory Construction.

confined to damaged goods, and it is not the intent of Congress that the United States should in any case exact as duties an amount greater than the value of the property imported. Your question is, therefore, answered in the affirmative.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

NAVY—CONTRACTS OF MINORS—STATUTORY CONSTRUCTION.

A minor who at the age of 19, with the consent of his father, enlisted in the Navy, has not the right on coming of age to demand his discharge under the rule which applies to his ordinary civil contracts.

The United States have the right to prescribe the rules and conditions under which voluntary or compulsory services are to be rendered by citizens.

The period at which persons reach their majority and become *sui juris* with respect to the ordinary affairs of life can not abridge this power of the General Government.

If a statute authorizes a minor by enlistment to bind himself during his minority, he can bind himself for a further period.

The phrase "other persons" in the act of March 2, 1837, included minors above 18 as well as men of full age.

DEPARTMENT OF JUSTICE,

April 16, 1896.

SIR: I have the honor to give my opinion on the question submitted in your letter of the 9th instant, whether or not one who at the age of 19, with the consent of his father, enlisted in the Navy, has the right on coming of age to demand his discharge under the rule which applies to his ordinary civil contracts.

The question is controlled by the following sections of the Revised Statutes, as amended by the act of May 12, 1879 (21 Stat., 3), and by section 2 of the act of February 23, 1881 (21 Stat., 338):

"SEC. 1418. Boys between the ages of fourteen and eighteen years may be enlisted to serve in the Navy until they shall arrive at the age of twenty-one years; other persons may be enlisted to serve for a period not exceeding five years, unless sooner discharged by direction of the President.

Navy--Contracts of Minors--Statutory Construction.

"SEC. 1419. Minors between the ages of fourteen and eighteen years shall not be enlisted for the naval service without the consent of their parents or guardians.

"SEC. 1420. No minor under the age of sixteen years, no insane or intoxicated person, and no deserter from the naval or military service of the United States shall be enlisted in the naval service.

"SEC. 1624, ART. 19. Any officer who knowingly enlists into the naval service any deserter from the naval or military service of the United States, or any insane or intoxicated person, or any minor between the ages of fifteen and eighteen years, without the consent of his parents or guardian, or any minor under the age of fifteen years, shall be dishonorably dismissed from the service of the United States."

It will be noted that section 1418 provides that all persons other than boys between 14 and 18 years may be enlisted to serve for a period not exceeding five years. Section 1419 requires the consent of parents and guardians for the enlistment of such minors; but no such condition is required by this or any other law for the enlistment of minors over 18.

Section 1420 prohibits the enlistment of any minor under 14, but there is no prohibition against enlisting minors over 18.

Section 1624, article 19, requires the dishonorable dismissal of any officer who knowingly enlists into the naval service a minor under 18 without the consent of his parents or guardian; but there is no penalty for enlisting minors over 18 with or without such consent.

It is clear from these provisions that Congress has authorized the enlistment in the Navy of minors who are over 18, and that the consent of parents and guardians is not necessary to make the enlistment valid.

The United States are empowered to raise and maintain a navy, and have a right to prescribe the rules and conditions under which voluntary or compulsory services are to be rendered by citizens.

The periods at which persons reach their majority and become *sui juris* with respect to the ordinary affairs of life can not abridge this power of the General Government. If the several States should, as they may, extend the period of

Navy—Contracts of Minors—Statutory Construction.

minority to the age of 25, it is manifest that the power of the Federal Government to provide for the common defense would be greatly abridged if its relations with its citizens, in respect of service in the Army or Navy, are limited by the status which such citizens have under State laws. Our armies and navies would lack stability if terms of enlistment could be abridged at the will of those who reach their majority according to the laws of their States of domicile.

As a minor over 18 can by enlistment bind himself during his minority, there is no reason why he can not bind himself for a further period.

The conclusion I have reached is not in accord with that of my predecessor, the Hon. John Nelson. (4 Opin., 350.) He treated the question as if citizens of the United States sustain the same relation to the Government with respect to service in the Army and Navy as they do to ordinary persons in matters of contract, and tests the question by the usual rules applicable to the contracts of minors.

In re McNulty, 2 Lowell, 270 (Federal Cases, 8917), minors over 18, who enlisted without the consent of their parents, were discharged on *habeas corpus*. The reasoning of that case is opposed to my conclusion, but carried to its logical result it would deny the right of the Government to enlist any minor over 18 with or without the consent of parent or guardian, for it holds that the act of March 2, 1837 (5 Stat., 153), now carried into section 1416, which provided for enlisting "boys" between the specified ages and "other persons," meant by the latter only men of full age by the law of the State where the contract of enlistment is made. This construction would entirely deprive the Government of authority to enlist minors over 18, although it is well known that this class is peculiarly desirable and may be necessary for military and naval service. I know of no reason for supposing that Congress did not consider minors above 18 to be "persons." On the contrary, the use of the expression "other persons," after the mention of minors under 18, shows that Congress had no such idea.

It seems clear to me that minors between 14 and 18 are treated as one class and their enlistment made lawful conditionally, while all persons over 18, whether of age or not,

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were included in the phrase "other persons" who may be enlisted for five years. This view is supported by *In re Doyle* (18 Fed. Rep., 369), which sustained the enlistment of a minor over 18 made without consent of parent or guardian.

If the statute authorizes the enlistment of a minor, then his contract is binding. (Tyler on Infancy and Coverture, sec. 96.) If it is binding, it affects him just as it would affect any other person. It is not strange that the Government, which has the undoubted right to require the involuntary service of minors, should provide for obtaining it voluntarily.

In reaching a conclusion I have been much influenced by Judge Story's discussion of the principles involved. (See *United States v. Bainbridge*, 1 Mason, 71.)

Respectfully,

JUDSON HARMON.

The SECRETARY OF THE NAVY.

 WORLD'S FAIR—MEDALS.

The law authorizing the Secretary of the Treasury to furnish electrotypes and photographs of the medals of award to exhibitors at the World's Fair to whom medals have been awarded, and to newspapers and periodicals for publication, carries with it the authority to those to whom such electrotypes and photographs may be furnished to have prints made therefrom without further or more specific authority.

The exhibitors, printers, or publishers have not the right to insert the name of the exhibitor in the blank space which will be used for that purpose on the medal.

After the exhibitors shall have received the medals and diplomas awarded them, the Treasury Department has no further authority over them, and is not authorized to say what use shall or shall not be made of them, or to restrict the making or using of facsimiles of them by exhibitors to whom they have been awarded, beyond what is prescribed by the express provisions of the statutes referred to in this opinion.

DEPARTMENT OF JUSTICE,

April 18, 1896.

SIR: I have your communication of the 15th instant, referring to section 3 of act of August 5, 1892 (27 Stat., 389), and to section 3 of the act of March 3, 1893 (27 Stat., 587), under which authority was given to the Treasury Department to

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make certain medals and diplomas to be awarded to exhibitors at the World's Columbian Exposition; also to the section in the general appropriation act of March 2, 1895 (28 Stat., 928), by which the Secretary of the Treasury is "authorized to furnish electrotypes or photographs of the medal of award of the World's Columbian Exposition to exhibitors to whom medal has been awarded, at the expense and cost of such exhibitors, and also to furnish the same to newspapers and periodicals for publication, provided the publishers to whom the electrotypes or photographs are furnished pay the expenses thereof, but that no electrotypes or photographs shall be furnished to any persons except those to whom medal has been awarded and to newspapers and periodicals paying for the same, and any other person printing facsimiles of said electrotypes or photographs of said medals shall be liable to the penalty prescribed by act of August 5, 1892."

You request an expression of my opinion "whether the law authorizing the furnishing of electrotypes to exhibitors carries with it also the authority to have prints made therefrom, or must the printers and publishers receive authority from the Department before using the electrotypes in the advertisements of their customers."

You further inquire whether "either the exhibitors or printers or publishers have the right to insert the name of the exhibitor in the blank space which will be utilized for that purpose on the medal."

You further request to be advised whether, "after the exhibitors shall have received the medals and diplomas awarded them, this Department has any further authority over them, or any authority to say what use shall or shall not be made of them, or to restrict the making or using of facsimiles of them by exhibitors to whom they have been awarded."

The evident purpose and intent of Congress in its legislation on this subject was that the medals and diplomas awarded to exhibitors at the World's Columbian Exposition should receive and retain the character of credible and abiding testimonials of the truth of what is inscribed on them, and to that end severe penalties were attached to counterfeiting and to fraudulently and unlawfully having in

World's Fair—Medals.

possession or causing to be circulated any duplicate or counterfeits of such medals or diplomas.

In an opinion heretofore given by me, in response to a request from you of November 4, 1895, I stated that section 3 of the act of August 5, 1892 (27 Stat., 389), which authorized the Secretary of the Treasury to give the holder of a medal properly awarded to him permission to have duplicates thereof made at any of the mints of the United States, from gold or silver or bronze, at the expense of the person desiring the same, was repealed by act of March 3, 1893. (27 Stat., 587.)

The purpose there manifested of denying to lawful holders of such medals the privilege of having the same duplicated at the mints of the United States is still more clearly evinced by the express provision of section 3 of the act of March 3, 1893, prohibiting every person within the United States or any Territory thereof, without lawful authority, from making or aiding or assisting in making any dies, hub, plate, or mold, in steel, plaster, or any other substance whatsoever, in the likeness or similitude as to the design or inscription thereon, of any die, hub, plate, or mold, designated for the striking of the medals and diplomas of award for the World's Columbian Exposition, as provided in section 3 of the act of August 5, 1892.

It appears from your letter that the provision of the act of March 2, 1895 (28 Stat., 928), authorizing the Secretary of the Treasury to furnish electrotypes or photographs of the medals of award, was induced by the unexpected delay in the completion and delivery of the medals awarded to the exhibitors, and to enable the successful exhibitors to enjoy the privilege of using cuts of their medals without incurring the penalties prescribed by the act of March 3, 1892.

The act of March 2, 1895, is specific in the authority granted to the Bureau of Engraving and Printing, under the supervision of the Secretary of the Treasury, "to print upon the blank diplomas authorized by section 3 of the act of August 5, 1892, as amended by the act of March 3, 1893, the names of the persons to whom the diplomas are to be awarded by the World's Columbian Commission."

I have the honor, then, to reply to your inquiries as follows:

1. The law authorizing the Secretary of the Treasury to

Special Privileges—Regulations.

furnish electrotypes and photographs of the medals of award to exhibitors to whom medals have been awarded, and to newspapers and periodicals for publication, carries with it the authority to those to whom such electrotypes and photographs may be furnished to have prints made therefrom without further or more specific authority.

2. The exhibitors, printers, or publishers have not the right, in my opinion, to insert the name of the exhibitor in the blank space which will be utilized for that purpose on the medal.

3. After the exhibitors shall have received the medals and diplomas awarded them, the Treasury Department has not any further authority over them, and has not any authority to say what use shall or shall not be made of them, or to restrict the making or using of facsimiles of them by exhibitors to whom they have been awarded, beyond what is prescribed by the express provision of the statutes already referred to.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

SPECIAL PRIVILEGES—REGULATIONS.

A limitation by the Secretary of the Treasury of the right to kill sea otter within a certain area to a certain race or class of people would be granting a special privilege and would violate section 1956 of the Revised Statutes.

DEPARTMENT OF JUSTICE,
April 21, 1896.

SIR: I have the honor to give my opinion, as requested by your letter of the 18th instant. The question presented is whether Article VI of your proposed regulations as to the killing of sea otter conflicts with the last sentence of section 1956 of the Revised Statutes. By act of Congress approved February 21, 1893 (27 Stat., 472), the provisions of that section are made applicable to the waters of the North Pacific

Duties.

Ocean and Bering Sea as defined in the award of the Paris Tribunal. Section 1956 prohibits the killing of various fur-bearing animals, but permits you, under such regulations as you may prescribe, to authorize the killing of any such animals except fur seals, but provides that you shall not "grant any special privileges." Your said Article VI prescribes that only resident natives of Alaska (Indians) and a certain class of white men shall have the privilege of killing sea otter within said area.

A special privilege is one which is not open to all persons alike who comply with terms and conditions fairly within the power of all. The limitation of a right to people of a specified race or class, therefore, is necessarily a special privilege. In my opinion, your proposed regulation would be a violation of the last clause of section 1956.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

DUTIES.

Section 14 of the customs administrative act did not in any way limit the power of collectors of customs to reliquidate duties in the interest of the Government within one year after entry.

DEPARTMENT OF JUSTICE,

April 29, 1896.

SIR: Answering your communication of April 27, I have the honor to say that, in my opinion, section 14 of the customs administrative act of June 10, 1890, did not limit in any way the power of the collector of customs to reliquidate duties in the interest of the Government within one year after the time of entry, as recognized in section 21 of the antimoietty act of June 22, 1874. (See opinion of General Appraiser Somerville, G. A. 1304.)

Very respectfully,

HOLMES CONRAD,

Acting Attorney-General.

The SECRETARY OF THE TREASURY.

Civil Service Commission.

CIVIL SERVICE COMMISSION.

The certificate of eligibles delivered to the appointing officer by the subordinates of the Civil Service Commission is a complete authority to such officer to make any selection he may desire therefrom, and is a complete protection to the appointee.

DEPARTMENT OF JUSTICE,

May 1, 1896.

SIR: I have the honor to acknowledge your communication of April 23, accompanying a letter from the Civil Service Commission, asking my opinion upon the case of James P. Baggott. It appears that on March 14, 1896, the postmaster at Racine, Wis., in accordance with the civil-service rules, requested a certificate of eligibles for filling a vacancy in a clerical position in his office. Baggott's name was the fourth on the eligible list and should not have been certified (Postal Rule IV), although possibly had everything been done regularly it would eventually have appeared. (General Rule IV, sec. 3.) The postmaster, assuming, as he had a right to do, that the certification made to him was in accordance with the civil-service rules and regulations, selected Baggott, who was appointed. So far as appears from the facts stated by the Commission, Baggott's appointment was made before the appointing officer was aware of the irregularity in the certification.

This case is similar to that of Frank C. Moore, discussed in my opinion of January 9, 1896, except that in Moore's case the irregularity was not discovered until he had served over six months and received an absolute as well as probationary appointment. In my opinion, however, this distinction is not material. The appointing officer must necessarily place absolute reliance upon the certificate received by him from the board of examiners. The appointment is usually made promptly, and the appointee often gives up other employment, so that it would be a great injustice to him to be thrown out of his new place in the Government service on account of a mistake made by some subordinate of the Civil Service Commission.

I think that the regularity of the steps taken by the Civil Service Commission is not jurisdictional; and that, while the subordinates of that Commission are subject to discipline for

Tax on State Bank Circulation.

such misfeasances as occurred in the present case, nevertheless the certificate which they deliver to the appointing officer is a complete authority to the latter and a complete protection to the appointee.

Answering the first question submitted, therefore, it is my opinion that Baggott's appointment was legal. This disposes also of the second question.

Answering the third question, as to whether there is "any law or rule which will be effective in preventing a board from securing the appointment of a person who is ineligible or who has never been examined by simply entering his name on the certificate," I know of no method except the selection of competent and careful boards of examiners. Doubtless every effort to this end has been made by the Civil Service Commission; and this case, therefore, must be classed among the mistakes that occasionally and unavoidably occur in all business affairs. I do not think that I can properly advise as to whether the eligible whose right to certificate was ignored has any redress in law.

Very respectfully,

JUDSON HARMON.

The PRESIDENT.

TAX ON STATE BANK CIRCULATION.

The tax on State banks, imposed by the act of February 8, 1875, chapter 36, sections 19 and 20 does not apply to paper which can not be used in the community as money without danger of total loss to whoever may take it.

DEPARTMENT OF JUSTICE,

May 5, 1896.

SIR: I have the honor to acknowledge the receipt of your letter of April 30, requesting my opinion as to whether the following order "is such a note, on the circulation of which, in lieu of the money or currency of the United States, a tax of 10 per centum is imposed by sections 19 and 20 of the act of February 8, 1875 (18 Stat., 311)."

Tax on State Bank Circulation.

The order is as follows:

“OFFICE OF COLUMBUS SAVINGS BANK, [10.
 “No. 1.] “Columbus, Ga., 1st day of April, 1896.
 “Pay to Louis F. Garrard, or bearer, ten dollars (\$10.00)
 in merchandise silver bullion, at retail.
 “H. B. CROWELL,
 “Assistant Treasurer.
 “To G. GUNBY JORDAN,
 “President.”

In *Hollister v. Mercantile Institution* (111 U. S., 65), Chief Justice Waite, speaking for the court, said:

“From this review of the legislation on the general subject, and the apparently studied use by Congress of words of appropriate signification, whenever it was intended to cover anything else than promissory notes, in the commercial sense of that term, we are led to the conclusion that only such notes as are in law negotiable so as to carry title in their circulation from hand to hand, are subjects of taxation under the statute.”

If the instrument be expressed to be payable “in cash or specific articles” in the alternative, or “in merchandise,” or in any other article than money, as, for instance, “an ounce of gold” (*Roberts v. Smith*, 58 Vt., 494), it becomes a special contract and by the law merchant loses its character as commercial paper. In order to possess the quality of negotiability it should afford on its face every element necessary to fix its value.

The order here is not payable in money; it is payable in silver bullion, which is an article of merchandise; its value is measured in dollars; but the order is expressly for merchandise and not for money.

It is not a contract on which an action of debt could be maintained by the holder of it. It is not negotiable, can not be used as currency, will not pass from hand to hand by delivery merely, without indorsement, can not in short, be used in the community as money without danger of total loss to whoever may take it. Hence, it is not, in my opinion,

Department Clerks—Departmental Practice.

such a note as is embraced within sections 19 and 20 of the act of February 8, 1875.

Yours, respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JUDSON HARMON.
The SECRETARY OF THE TREASURY.

DEPARTMENT CLERKS—DEPARTMENTAL PRACTICE.

Employees of the Bureau of Engraving and Printing are entitled to leave of absence under the act of July 6, 1892, chapter 154, notwithstanding the provisions of the act of March 3, 1893, chapter 211, section 5.

When an act of Congress has received for ten years a uniform departmental construction, which was known to Congress, and a subsequent act in *pari materia* is enacted, without change of language, there is a presumption of considerable force that the new language is intended to receive the same construction as the old.

A general act does not operate as a repeal of a prior special act when there is no necessary inconsistency in their standing together.

The provisions of the act of 1893 apply only to clerks and employees in the city of Washington.

DEPARTMENT OF JUSTICE,
May 6, 1896.

SIR: I am in receipt of your communication of April 30, asking my official opinion as to the statute governing leaves of absence in the Bureau of Engraving and Printing.

The act of July 6, 1892, chapter 154, applicable only to employees of the Bureau of Engraving and Printing, provides that they "shall be allowed leave of absence with pay not exceeding thirty days in any one year." It contains special provisions for the pieceworkers in that Bureau, regulating their pay while on leave of absence "by the average amount of work done by such person and the pay therefor during the several months of the year."

The legislative, etc., appropriation act of March 3, 1893, chapter 211, section 5, a provision applicable to all clerks and other employees in the several Executive Departments, provides that the head of a Department "may grant thirty

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days' annual and thirty days' sick leave in any one year to each clerk and employee" with the possible extension of sick leave to sixty days "in exceptional and meritorious cases, where to limit such sick leave would work peculiar hardship."

The question now presented is whether the act of 1893 operates as an implied repeal of the act of 1892 and is applicable to employees of said Bureau.

The Chief of the Bureau of Engraving and Printing in his letter of May 4 to yourself, which has been submitted to me, claims that his Bureau is not strictly a part of any Executive Department, and therefore is not within the purview of the statute of 1893. Assuming, however, that this claim is not well founded, and that the Bureau is properly a part of the Treasury Department, nevertheless it is my opinion that its employees are still subject to the provisions of the statute of 1892.

The language of the statute of 1893 describing the clerks and employees who are entitled to leave of absence thereunder is copied from the provision *in pari materia* of the legislative, etc., appropriation act of March 3, 1883, chapter 128, section 4. The Chief of the Bureau of Engraving and Printing states in his letter that by the uniform departmental construction of the statute of 1883 it was held inapplicable to his Bureau. This was certainly also the understanding of subsequent Congresses, as is shown by their action in adopting special legislation for the benefit of the employees of the Bureau. (Acts of March 3, 1887, chap. 392, and July 6, 1892, chap. 154; Cong. Rec., Feb. 28, 1887, p. 2429, and July 1, 1892, p. 5723.) When an act of Congress has for a considerable period of time received a uniform departmental construction, and this construction was known to Congress, and a subsequent act *in pari materia* is enacted without change of language, there is a presumption of considerable force that the new language is intended to receive the same construction as the old. (20 Opin., 719, 721.) Moreover, the statute of 1893 contains no express repeal of or reference to the statute of 1892. There is no necessary inconsistency in the two acts standing together. The maxim *generalalia specialibus non derogant* applies, and the later act does not operate as an implied repeal. (*Ex parte Crow Dog*, 109 U.S.,

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556, 570.) It should be added that the nature of the work done in the Bureau of Engraving and Printing is so different from that done in the other Executive Departments as to confirm the view that the special act governing leaves of absence to its employees was not intended to be repealed.

I therefore have the honor to advise you that the statute of 1892 is still in force and is the only law governing leaves of absence in that Bureau.

Your further communication of May 4 asks my opinion whether the above-cited provisions of the statute of 1893 relate to all employees of your Department, whether located at the seat of Government or elsewhere. This question is, in my opinion, to be answered in the negative. As already stated, the persons affected by the act of 1893 were intended to be the same as those affected by the act of 1883, and by the settled executive and legislative construction of the former act its operation is confined to clerks and employees in this city. (See acts of June 27, 1884, chap. 126; August 28, 1890, chap. 812; October 1, 1890, chap. 1260.)

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

REVENUE-CUTTER SERVICE.

Sick seamen of the Revenue-Cutter Service are entitled to the benefit of the Marine-Hospital fund provided for sick and disabled seamen.

DEPARTMENT OF JUSTICE,

May 7, 1896.

SIR: I have your letter of May 2, requesting my opinion upon the question whether the Treasury Department "is required under existing law to extend the benefits of the Marine-Hospital fund to the sick and disabled officers and seamen of the Revenue-Cutter Service." You call my attention to the acts of June 29, 1870, March 3, 1875, and June 26, 1884, and you state that while it would appear from the wording of section 1 of the act of June 29, 1870, that all Government vessels were exempt from the hospital tax, yet that seamen on revenue cutters were required to pay

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this tax and that the regulations of the Revenue-Marine Service, paragraph 69, expressly provide for this contribution to the Marine-Hospital fund.

A review of the legislation on this subject from 1798, when the tax of 20 cents a month on seamen employed on vessels of the United States engaged in foreign and coasting trade was first laid for the purpose of establishing such hospital fund, down to the present time shows that little, if any, regard was had to symmetry or consistency in the adaptation and structure of the several statutes.

The fund for the maintenance of what was known as the Marine Hospital was derived originally, and as late as 1875, from taxes laid upon seamen employed on vessels of the United States arriving from a foreign port or registered vessels employed in the coasting trade.

An obvious propriety would seem to require that a fund thus derived from the wages of seamen should be devoted exclusively to the care, comfort, and maintenance of those who contributed to the fund.

By section 15 of the act of June 26, 1884, all the acts and parts of acts providing for the assessment and collection of a hospital tax for seamen were repealed, and the expense of maintaining the Marine-Hospital Service thereafter was to be borne by the United States out of the receipts for duties on tonnage provided by that act. So the United States Government from that time on has provided the fund from which this service has been maintained.

While in the earlier acts the fund appropriated for the Marine-Hospital Service was directed to be employed "for the care and relief of sick and disabled seamen employed in registered, enrolled, and licensed vessels of the United States," yet by the act of March 3, 1875, section 3, it was provided:

"That term 'seaman,' wherever employed in legislation relating to the Marine-Hospital Service, shall be held to include any person employed on board in the care, preservation, or navigation of any vessel, or in the service, on board, of those engaged in such care, preservation, or navigation."

This clearly embraces seamen on board revenue cutters.

In the chapter of the Revised Statutes on the Government

Naval Academy—Appointment of Cadets.

Hospital for the Insane, section 4843, insane persons belonging to the Revenue-Cutter Service are provided for in express terms. I do not think, however, that the express provision for them in that chapter justifies their exclusion from the other provisions of the statute wherein they are not expressly named. On the contrary, I think it manifest that the later statutes plainly indicate a general policy on the part of the Government to extend benefits of the hospital service to all persons, whether in the navy, marine, or revenue service. And I am of opinion, therefore, that the sick seamen of the Revenue-Cutter Service are entitled to the benefit of the Marine Hospital provided for sick and disabled seamen.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

NAVAL ACADEMY—APPOINTMENT OF CADETS.

A cadet, nominated to the Naval Academy upon the recommendation of a Member of the House of Representatives who, since the recommendation and nomination, has been unseated by contest of election, can not be lawfully deprived of his place if he passes his examination.

The Secretary of the Navy is not to revoke such a nomination and notify the newly seated member that a vacancy occurs. He has no right to call for a new recommendation, except under section 1516, Revised Statutes, when the candidate fails to pass his examination.

The notice provided for by section 1514, Revised Statutes, as amended, was intended to be given to the Member of Congress actually sitting, and the recommendation provided by said section was intended to be made by such Member and action duly taken thereon should not be affected by any subsequent event, except the failure of the nominee to pass his examination.

Until a decision is made which unseats them, Members of Congress whose seats are contested are considered to be in all respects endowed with the same rights, powers, and privileges as other members.

DEPARTMENT OF JUSTICE,
May 7, 1896.

SIR: I have the honor to give my opinion, as requested in your letter of the 21st ultimo. You ask what is "the status

Naval Academy—Appointment of Cadets.

of a naval cadet recently nominated to the Naval Academy at Annapolis" upon the recommendation of a Member of the House of Representatives, who, since the recommendation and nomination, has been unseated by contest of election. The practical question is whether or not you are to revoke the nomination and notify the newly seated Member that a vacancy exists.

The answer depends on section 1514, Revised Statutes, as amended July 26, 1894 (2 Supp., 206), which provides that—

"The Secretary of the Navy shall, as soon after the fifth of March in each year as possible, notify in writing each Member and Delegate of the House of Representatives of any vacancy that may exist in his district.

"The nomination of a candidate to fill said vacancy shall be made upon the recommendation of the Member or Delegate, if such recommendation is made by the first day of July of that year; but if it is not made by that time the Secretary of the Navy shall fill the vacancy by appointment of an actual resident of the district in which the vacancy exists," etc.

The date named in the statute was undoubtedly chosen with reference to the meeting of Congress. The requirement of prompt notice was due to manifest reasons of public policy. The object was not so much to confer a privilege on the Members of Congress as to insure full classes of cadets. Congress of course knew that nominees require time for preparation and travel, and also knew that seats of Members of Congress are often contested; yet no exception was made with respect to notice in cases of Members whose seats are contested, and none for the suspension or revocation of recommendations in such cases, or of the nominations made thereon. It follows, therefore, that Congress intended the notice to be given to, and the recommendation to be made by, the Member of Congress actually sitting, and that action duly taken thereon should not be affected by any subsequent event except the failure of the nominee to pass the examination.

This is quite consistent with the general rules which apply to Members of Congress whose seats are contested. They are considered, until a decision is made which unseats them, to be, in all respects, endowed with the same rights, powers,

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and privileges, as other members. Laws passed by their votes are valid; all acts done by them are binding, and there is no reason why a mere recommendation to an executive department should be governed by any different rule.

Even if you had not acted upon the recommendation until after the Member who made it was unseated, your nomination thereon would be perfectly legal and valid. This was held by Attorney-General Bates (10 Opin., 46), who said, a question having arisen as between recommendations made by a Member of Congress and his predecessor, "I am clearly of the opinion that you have power to appoint anyone who stands recommended by a Member of Congress who was, *at the time he recommended*, representing the district in which the applicant resides." The opinion sets forth the "very injurious, not to say absurd, results" which would follow from the view that the Member of Congress referred to in the statute is the one who represents the district at the time of final appointment or entry into the Academy. As the decision in a contested election case is not retroactive, new Members who succeed to seats made vacant by death or resignation must be held to occupy the same position with respect to recommendations as successful contestants. The uncertainty and embarrassment which would follow if recommendations should be considered annulled in such cases are quite apparent.

But, however it might be in case you had not acted on the recommendation, I do not think you have any right to call for a new recommendation except under section 1516, which provides that, when any candidate nominated upon the recommendation of a Member of Congress fails to pass the examination, "the Member or Delegate shall be notified to recommend another candidate," etc.

As it appears from your statement that you acted on the recommendation while the Member who made it then actually represented his district in Congress, my opinion is that the matter has passed beyond your reach, and that, if the candidate passes the examination, he can not lawfully be deprived of his place.

While the exact question was not there considered, some

Duties.

of the reasons for my opinion are sustained in 10 Opinions, 494, and 21 Opinions, 164.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE NAVY.

DUTIES.

The Secretary of the Treasury has no power to permit collectors of customs to receive special deposits of penal duties, to be returned by them to the importers in case the duties should be remitted. All duties paid to the collector must be placed to the credit of the Treasurer of the United States.

DEPARTMENT OF JUSTICE,

May 16, 1896.

SIR: I have the honor to acknowledge your communication of May 8, in which you ask my official opinion whether you have the power to make a customs regulation whereby collectors of customs in cases where penal duties have been assessed may receive the amount of such duty personally as a special deposit, pending your action upon the importers' application for a remission or mitigation of the penalty, the amount to be returned to the importer by the collector's check should you grant such application, and to be turned into the Treasury by the collector should your decision be adverse.

Section 3010 of the Revised Statutes provides that all moneys paid to a collector for "unascertained duties" shall be "placed to the credit of the Treasurer of the United States, and shall not be held by the collector * * * to await any ascertainment of duties." This is a reenactment of the statute of 1839, which was intended to avert the danger of future defalcations by collectors, such as had occurred in the famous case of Samuel Swartwout. (*Barney v. Rickard*, 157 U. S., 352, 356.) This section was not repealed by the customs administrative act of 1890, and it is my opinion that it is applicable to these penal duties, and therefore that it forbids the adoption of a regulation such as you propose.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

Seal Fisheries—Regulations.

SEAL FISHERIES—REGULATIONS.

Section 1956, Revised Statutes, as amended, applies to the Territory of Alaska and the waters thereof, and to all the dominion of the United States in the waters of Bering Sea. It is lawful for the Secretary of the Treasury, under said section, to direct captains of the fur-sealing fleet to seize all foreign vessels found hunting or to have hunted sea otter within said waters.

DEPARTMENT OF JUSTICE,

May 20, 1896.

SIR: I have the honor to acknowledge the receipt of your letter of May 15, 1896, asking for an opinion as to whether or not a direction under section 1956 of the Revised Statutes, as amended by section 3 of the act of March 2, 1889 (25 Stat., 1009), to the captains of the fur-seal patrolling fleet to seize all foreign vessels found hunting or to have hunted sea otter within three miles of the coast of Alaska or other territory of the United States would be in violation of law.

Section 1956 is as follows:

“No person shall kill any otter, mink, marten, sable, or fur seal, or other fur-bearing animal within the limits of Alaska Territory, or in the waters thereof; and every person guilty thereof shall, for each offense, be fined not less than two hundred nor more than one thousand dollars, or imprisoned not more than six months, or both; and all vessels, their tackle, apparel, furniture, and cargo, found engaged in violation of this section shall be forfeited; but the Secretary of the Treasury shall have power to authorize the killing of any such mink, marten, sable, or other fur-bearing animal, except fur seals, under such regulations as he may prescribe; and it shall be the duty of the Secretary to prevent the killing of any fur seal and to provide for the execution of the provisions of this section until it is otherwise provided by law; nor shall he grant any special privileges under this section.”

Section 3 of the act of March 2, 1889, is as follows:

“That section nineteen hundred and fifty-six of the Revised Statutes of the United States is hereby declared to include and apply to all the dominion of the United States in the waters of Behring Sea; and it shall be the duty of the President, at a timely season in each year, to issue his proclamation and

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cause the same to be published for one month in at least one newspaper, if any such there be published, at each United States port of entry on the Pacific Coast, warning all persons against entering said waters for the purpose of violating the provisions of said section; and he shall also cause one or more vessels of the United States to diligently cruise said waters and arrest all persons, and seize all vessels found to be, or to have been, engaged in any violation of the laws of the United States therein."

Section 1956, as amended, applies to the Territory of Alaska and the waters thereof, and to all the dominion of the United States in the waters of Bering Sea.

In respect of the waters thus embraced, I am of the opinion that your instructions are authorized by law. (In re Cooper, 143 U. S., 472.)

Respectfully,

HOLMES CONRAD,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

TREATIES—CHINESE.

A treaty, so far as its provisions are self-executing, repeals a prior statute with which it is in conflict.

The convention of 1894 between the United States and China is a treaty. Under its provisions a Chinese subject resident in a British colony, and belonging to one of the privileged classes, may be admitted here upon a certificate from the colonial government.

DEPARTMENT OF JUSTICE,
May 20, 1896.

SIR: I have the honor to acknowledge your communication of May 13, asking an official opinion as to the construction and operation of Article III of the convention of 1894 between the United States and China. (28 Stat., 1211.)

This article provides that "Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers," when seeking admission into the United States, "may produce a certificate from their Government or the Government where they last resided." The

Treaties—Chinese.

question has arisen whether Chinese subjects belonging to the privileged classes above mentioned and who are residents of the British colony of Hongkong, may obtain admission to the United States upon production of a certificate signed by the registrar-general in that colony. I assume, for the present purposes, that the registrar general is the proper representative of the colonial government.

While called a convention, the document to which you refer is clearly a treaty within the meaning of the Constitution of the United States. It is, therefore, so far as its provisions are self-executing, a part of the supreme law of the land. It is my opinion that the provisions of the article under consideration are self-executing. Its language is clear. It requires a certificate from the government of the colony of Hongkong. It requires nothing more than that. Its requirements would not be satisfied by a certificate from the Government of China.

The act of July 5, 1884, chapter 220, section 6, requires that certificates in similar cases should be issued by the Chinese Government, "or of such other foreign Government of which at the time such Chinese person shall be a *subject*." Prior, therefore, to the treaty of 1894 a certificate from the authorities at Hongkong would have been insufficient in the cases now under consideration, and a certificate from the Chinese Government would have been necessary.

You ask my opinion whether the treaty "waives or modifies the requirement of" the act of 1884. As the treaty is subsequent to the statute, and as its provisions are self-executing, I am of the opinion that it does modify the requirement of the statute, so that the certificate must now come from Hongkong and not from China. (*The Cherokee Tobacco*, 11 Wall., 616, 621; *Whitney v. Robertson*, 124 U. S., 190, 194; 13 Opin., 354.)

Very respectfully,

HOLMES CONRAD,
Acting Attorney-General.

THE SECRETARY OF THE TREASURY.

Interior Department—Departmental Practice.

INTERIOR DEPARTMENT—DEPARTMENTAL PRACTICE.

The Columbia Institution for the Deaf and Dumb is not a part of the Interior Department.

Advertisements for proposals under section 3709, R. S., are not required for supplies or services for this institution.

Uniform departmental practice should receive great, if not controlling, weight in statutory construction, especially where the statutory language was not modified when incorporated in the Revised Statutes.

DEPARTMENT OF JUSTICE,

May 20, 1896.

SIR: I have the honor to acknowledge your communication of May 12, asking my official opinion as to whether purchases and contracts for supplies or services for the use of the Columbia Institution for the Instruction of the Deaf and Dumb must be made in conformity with the provisions of section 3709 of the Revised Statutes, as amended by the acts of January 27 and April 21, 1894. It appears from the papers which you furnish me that the institution mentioned was organized about 1856 as a volunteer association by Amos Kendall and others. The constitution of the association provided, among other things, that the institution should be located in the District of Columbia; that it should "be supported by donations, legacies, subscriptions of members and others, and such aid as Congress may be pleased to afford, and such other means as the board of directors may prescribe;" and that the moneys of the association should be paid out by the treasurer "on such vouchers as may be prescribed by the board of directors." The association was subsequently incorporated by Congress. (Act of February 16, 1857, chap. 46.) The act of incorporation recognized the right of the institution to receive contributions and to take and hold real and personal property, so far as might be necessary to its maintenance and efficient management (sec. 1); and that it should be "managed as provided for in its present constitution and such additional regulations as may from time to time be found necessary." (Sec. 2.) It provided for the maintenance and tuition of indigent deaf, dumb, or blind persons properly belonging to the District of Columbia; making the Secretary of the Interior the judge of the qualifications of such applicants, and providing for their maintenance and tuition out of the Treasury of the United States.

Interior Department—Departmental Practice.

(Sec. 4.) It gave the right to receive and instruct other deaf, dumb, and blind persons not at the expense of the Treasury. (Sec. 5.) It provided that the president and directors should report annually to the Secretary of the Interior. (Sec. 6.) These provisions, with some which have been subsequently added, are incorporated in the Revised Statutes, sections 4859–4868.

It is thus clear that the institution was originally intended to be, on the one hand, a corporation independent of the United States Government, while on the other hand it should be the means by which the Government should perform its charitable duty to the indigent deaf, dumb, and blind of the District of Columbia and, as such, the recipient of contributions from the National Treasury. It was not a bureau of the Interior Department, but the Government contributions were to be made through the Secretary of the Interior and accounted for to him.

Large appropriations have since annually been made by Congress for the benefit of this institution, and they have always, so far as I am aware, been paid through the medium of the Secretary of the Interior. By the sundry civil appropriation act of March 2, 1895, chapter 189 (28 Stat., 941), appropriations of \$52,500 were made “for support of the institution, including salaries and incidental expenses, for books and illustrative apparatus, and for general repairs and improvements,” and “for special repairs to the buildings and for the improvement of the grounds,” \$1,000; also, \$30,000 “for additional building complete.” It is not expressly provided by the statute that these disbursements shall be in any way under the jurisdiction of the Secretary of the Interior, but this seems to have been always the practical construction of the annual appropriations *in pari materia*, and I understand that the estimates annually submitted by the Secretary of the Treasury, which are the basis of Congressional action in this regard, represent these expenses as being under the jurisdiction of the Interior Department. It may be assumed, therefore, that the Congressional appropriation for the annual current expenses of the institution is properly payable through the Secretary of the Interior. The support of indigent pupils belonging to the District of Columbia has always,

Interior Department—Departmental Practice.

since 1857, been contributed through the Interior Department, as originally planned. To the appropriation for the current fiscal year is added the qualification that "all disbursements for this object shall be accounted for through the Department of the Interior." (District of Columbia appropriation act of March 2, 1895, chap. 176, p. 761.)

The so-called Dockery Act of July 31, 1894, chapter 174, section 7, provided that the Auditor for the State and other Departments should receive and examine all accounts relating to the District of Columbia, and also "accounts of all boards, commissions, and establishments of the Government not within the jurisdiction of any of the Executive Departments." The same section provided that the Auditor for the Interior Department should receive and examine all accounts of all bureaus and offices under the direction of the Secretary of the Interior, and also "all accounts relating to army and navy pensions, Geological Survey, public lands, Indians, Architect of the Capitol, patents, census, and to all other business within the jurisdiction of the Department of the Interior." The Comptroller of the Treasury has held that the appropriations relating to this institution constitute "business within the jurisdiction of the Department of the Interior" within the meaning of this section. (1 Comp. Dec., 19.) This decision appears to me to be clearly correct; and the Government contributions toward the support of this institution constitute "business within the jurisdiction of the Department of the Interior." It so happens, as appeared by the last annual report of that institution, that about eight-ninths of its current expenses are paid by these appropriations. This condition might be changed at any moment, however, by a charitable bequest; and I do not think that the corporation itself is in any sense a bureau, office, or other subdivision of your Department.

The precise question now presented is whether this corporation is in your Department within the meaning of section 3709 of the Revised Statutes, relating to "purchases and contracts for supplies or services in any of the Departments of the Government." This provision has been on the statute book for thirty-five years. (Act of March 2, 1861, chap. 84, sec. 10.) It is claimed in the correspondence which

Penitentiaries.

you submit, and it is nowhere denied, that this provision has always received a practical construction, whereby this institution has been excluded from its terms. If this be the case, that construction should receive great, if not controlling, weight (*United States v. Healey*, 160 U. S., 136, 141, 145), especially since the statutory language was not modified when it was incorporated in the Revised Statutes. (20 Opin., 721.) I think that this practical construction was the correct one, and therefore that your question must be answered in the negative. I have examined with care the able opinion of Assistant Attorney-General Hall to the contrary, but am unable to accept his conclusions.

Very respectfully,

HOLMES CONRAD,

Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

PENITENTIARIES.

The States of South Dakota and Montana having received grants for the erection of penitentiaries, the enabling act under which the two Dakotas, Montana, and Washington were admitted into the Union provided that North Dakota and Washington should have like grants for the same purpose. It appears that Washington already has a penitentiary. *Held*, that further legislation is required.

DEPARTMENT OF JUSTICE,

May 23, 1896.

SIR: I have the honor to acknowledge your letter of 9th instant, and to say in reply that I think further legislation is required in the matter of the penitentiary at Walla Walla, Wash. For the reasons stated in my letter of 9th instant, I think the situation is anomalous. The appropriation (27 Stat., 661) under which you purchased grounds and propose to erect a penitentiary in the State of Washington is in terms made "to carry into effect section 15" of the enabling act under which the two Dakotas, Montana, and Washington were admitted into the Union. The act of March 2, 1881 (21 Stat., 378), had appropriated \$30,000 for the erection of a penitentiary in the Territory of Dakota. Section 15 of the enabling act expressly granted to the State

Absence from Duty.

of South Dakota the lands acquired under the act of 1881 and any unexpended balances of the moneys thereby appropriated, and, having also transferred to Montana the penitentiary and all lands connected therewith at Deer Lodge City, provided:

“And the States of North Dakota and Washington shall, respectively, have like grants for the same purpose, and subject to like terms and conditions as provided in said act of March second, eighteen hundred and eighty-one, for the Territory of Dakota.”

This was merely a promise to make the four States equal by providing North Dakota and Washington with penitentiaries, as had been done with South Dakota and Montana. The act of 1893 (27 Stat., 661) was merely in the line of performing that promise. But as I am advised that Washington already has a penitentiary, it seems to me the attention of Congress should be called to the matter before any further expenditure of money is made. Certainly there is no authority at present for the transfer of the land you have already bought with the money appropriated by the last-named act.

Respectfully,

JUDSON HARMON.

The SECRETARY OF THE INTERIOR.

ABSENCE FROM DUTY.

The act of March 1, 1889, section 49, was not repealed or modified by the act of March 3, 1893, section 5. The object of the former was to provide for the public defense and that of the latter to regulate leaves of absence for private reasons or purposes. There is, therefore, no inconsistency between the two acts.

Leaves of absence of employees of the Government in the discharge of military duties are not to be charged to the thirty days allowed them annually for rest and recreation.

DEPARTMENT OF JUSTICE,

May 23, 1896.

SIR: I have the honor to give my opinion, as requested in your letter of the 12th instant, on the question whether section 49 of the act of March 1, 1889 (25 Stat., 772), is repealed

Absence from Duty.

or modified by section 5 of the act of March 3, 1893 (27 Stat., 715).

The former act provides—

“That all officers and employees of the United States and of the District of Columbia who are members of the National Guard shall be entitled to leave of absence from their respective duties, without loss of pay or time, on all days of any parade or encampment ordered or authorized under the provisions of this act.”

The latter, which was the legislative, executive, and judicial appropriation act, makes it the duty of the heads of the several Executive Departments, “in the interest of the public service, to require of all clerks and other employees of whatever grade or class, in their respective Departments, not less than seven hours of labor each day,” except Sundays and holidays, providing for thirty days annual and thirty days sick leave with pay, discretion being given to extend sick leave in certain cases.

This question had arisen in my own Department before your letter came, and I had decided it in the same way as the Solicitor of the Treasury, a copy of whose opinion you inclose. I approve that opinion, which states some of the reasons which require the conclusion that the earlier law is not affected by the later.

The objects of the two acts were different—that of the former being to provide for the public defense and that of the latter being to regulate and limit leaves of absence for private reasons or purposes. There is, therefore, no inconsistency or conflict between the two acts, so that the general repealing clause in section 6 of the act of 1893 does not apply to the part of the act of 1889 above quoted, or to any other parts, as it must be held to do if it applies at all.

It is not to be presumed that Congress intended by the later act to exclude from the militia of the District the large proportion of its citizens in the public civil service, yet this result would follow from any other construction than that which I have given it. The earlier act requires that all able-bodied male residents of the District be enrolled. (Sec. 1.) The exemptions recited (sec. 2) do not include civil employees of the Departments. Members of the militia are required

Departmental Clerks—Delegation of Power.

not only to engage in active service when called upon (sec. 5), but also to prepare themselves for such service by attending drills, etc. (Sec. 40 *et seq.*) The latter duty is quite as important as the former, and there is no more reason for holding that section 49 is repealed, which exempts members from civil duty without loss of pay or time, than for holding that the sections are repealed which require obedience to calls for active duty.

What I have already said applies to the direction to heads of Departments in the act of 1893 (sec. 5) to require "not less than seven hours labor" of all clerks and employees. This is merely correlative to the limitation of ordinary leave and does not apply when such persons are engaged in any form of militia duty.

It is absurd to suppose that Congress intended by this provision to empower or direct heads of Departments to neutralize the order of the President as Commander in Chief of the Militia (sec. 6), or that of the other commanding officers, or to compel employees to put in the leave allowed them for rest and recreation in the discharge of military duties.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

DEPARTMENTAL CLERKS—DELEGATION OF POWER.

Departmental clerks, messengers, and laborers are to be appointed and removed by the head of the Department, when not otherwise provided by statute. This power can not be delegated, but must be exercised by the Secretary or Acting Secretary.

DEPARTMENT OF JUSTICE,

May 26, 1896.

SIR: I have the honor to acknowledge your communication of May 14 asking my official opinion as to your power to delegate authority to make "appointments, promotions, reductions, and discharges of messengers and laborers" in your Department.

Your powers in this regard are similar to those of the heads of the other Executive Departments. (Act of Feb. 9, 1889, chap. 122, sec. 1.)

Departmental Clerks—Delegation of Power.

The employment of messengers and laborers in the Executive Departments is based upon section 169 of the Revised Statutes, which is as follows:

“Each head of a Department is authorized to employ in his Department such number of clerks of the several classes recognized by law, and such messengers, assistant messengers, copyists, watchmen, laborers, and other employes, and at such rates of compensation, respectively, as may be appropriated for by Congress from year to year.”

I think that the word “employ” in this section is used as the equivalent of “appoint” (see Rev. Stat., secs. 60, 194); and therefore that the sole responsibility of every appointment in an Executive Department rests upon the head of that Department, except where otherwise specially provided by statute, as in Revised Statutes, section 476. This view is confirmed by an examination of our early statutory law. When the Executive Departments were originally established it was expressly provided that the appointment of the clerks therein should be made by the heads of Departments. (Acts of July 27, 1789, chap. 4, sec. 2; Aug. 7, 1789, chap. 7, sec. 2; Sept. 11, 1789, chap. 13, sec. 2; Sept. 22, 1789 chap. 16, sec. 1; April 30, 1798, chap. 36, sec. 2; March 3, 1849, chap. 108, sec. 11.) Subsequent legislation indicated that Congress regarded employment and appointment as synonymous. (Acts of April 21, 1806, chap. 41, secs. 2, 4; Aug. 26, 1842, chap. 202, secs. 1, 11.)

Since the power of appointment is confided to the head of a Department, the power of removal belongs also to him. (*Ex parte Hennen*, 13 Pet., 230; *Blake v. United States*, 103 U. S., 227; *United States v. Allred*, 155 U. S., 591, 594.) The powers to promote and “reduce” are merely species of the power to appoint.

The power to appoint and remove being discretionary in character, it is my opinion that they can not be delegated. So far as I am aware, this has always been the practical construction of our legislation in this particular. It is true that you may inquire, investigate, and determine by the aid of your subordinates; but the final determination must be your act and not theirs. (See 7 Opin., 594, 597.) I am of the

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opinion, therefore, that all appointments and removals of messengers and laborers in your Department must be made by the Secretary or Acting Secretary of the Department; and that the power can be delegated neither to the Chief of the Weather Bureau, nor to the chief clerk, nor to anyone else.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF AGRICULTURE.

TREATIES—CHINESE.

The phrase "Chinese consul at the port of departure" used in Article II of the convention between the United States and China, proclaimed March 17, 1894, means the consul who represents the Chinese Government at the place where the laborer leaves the United States.

The words "port" and "land," used in said treaty, do not limit the right to return to such Chinese as travel by sea.

It is necessary for Chinese laborers to leave this country at a place which is a port and is within the jurisdiction of a Chinese consul, and that they should return to it at a port of entry where there is a collector, but as they have the right to go and return by land, these places need not be seaports.

DEPARTMENT OF JUSTICE,

May 26, 1896.

SIR: I have the honor to give my opinion, as requested in your letter of the 22d instant, upon the proper construction of Article II of the convention between the United States and China, concerning the subject of emigration, proclaimed March 17, 1894.

By Article I the coming of Chinese laborers to this country is absolutely prohibited for a period of ten years. Article II provides that such prohibition shall not apply to the return to this country of registered Chinese laborers having certain specified relatives here, or property, or debts of a certain value, but requires, as a condition of the right of such laborer to return, the deposit by him with the collector of customs of the district from which he departs of a written description of his family, property, or debts. The collector

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is required to furnish him with a certificate of his right to return. Article II then proceeds as follows:

“And such right of return to the United States shall be exercised within one year from the date of leaving the United States; but such right of return to the United States may be extended for an additional period, not to exceed one year, in cases where, by reason of sickness or other cause of disability beyond his control, such Chinese laborer shall be rendered unable sooner to return—which facts shall be fully reported to the Chinese consul at the port of departure, and by him certified to the satisfaction of the collector of the port at which such Chinese subject shall land in the United States. And no such Chinese laborer, shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required.”

Your letter with its inclosure presents the case of three Chinese laborers, duly registered at Boston according to law and Treasury regulations, and furnished with proper certificates in accordance with the treaty, who left the country from the district of Vermont, and, after visiting China, presented themselves for readmission at the same place in the district of Vermont after an absence of almost thirteen months. They were refused admission because the facts justifying the extension of the period of return were not reported “to the Chinese consul at the port of departure and by him certified,” etc., the collector holding such port of departure to be Canton, China, at which place they left that country, or Hongkong, a British port, at which they took ship. It appears that there is, of course, no Chinese consul at Canton, and that, for local and political reasons, the British Government permits none at Hongkong.

Your inquiry is whether the “port of departure,” at which the facts of sickness or disability are to be so reported, is the port from which the laborer goes from this country or that from which he starts on his return.

It is a well-known fact that Chinese laborers who leave this country almost invariably return to their own. This fact was, of course, well known to the framers of the treaty. They knew, also, that no country has consuls at its own

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ports. It seems clear, therefore, that they could not have meant the port of departure from China.

If this be true, it appears to follow that the framers of the treaty must have meant the port from which the laborer departs from this country. He is required to deposit a written description of his family, property, or debts "with the collector of customs of the district from which he departs."

While, at first glance, the phrase "port of departure" may appear, from its use in connection with the phrase "port at which such Chinese subject shall land in the United States," to indicate the point of beginning of the voyage of return, this appearance must give way before the manifest necessity of so construing the treaty, if possible, as to give it the operation which the parties plainly intended it to have. Besides, the two phrases may both fairly be construed as referring to the United States, requiring the fact of unavoidable detention to be reported to the Chinese consul at the port where the person desiring to return left this country, and the certificate thereof to be sent to the collector of the port at which he desires to reenter it.

As Chinese consuls in this country are received by our Government and subject to recall on their request, it was naturally willing to trust to their good faith, and the Chinese Government, one of the parties to the treaty, had the right to require of them the service it imposes. The only other possible construction is that the phrase "Chinese consul at the port of departure" was intended to designate our consuls at Chinese ports, but such construction would require an entire change of the language used. When that meaning was intended, Article III shows that the makers of the treaty knew how to express it. That article, in providing for the rights of Chinese officials, students, merchants, etc., to come to and reside in the United States, authorizes "a certificate from their Government, or the Government where they last resided, viséd by the diplomatic or consular representative of the United States in the country or port whence they depart."

While the language of the section you submit is not explicit, and the question presented can not, therefore, be

Treaties—Chinese.

answered with entire freedom from doubt, my opinion is that the officer to whom the facts of sickness or disability are to be reported is the consul who represents the Chinese Government at the place whence the laborer left the United States. While the words used, "port" and "land," usually relate to a sea voyage, they were used because the Chinese generally go and come by sea, and not because it was the intention to limit the right to return to such as travel in that way. This is apparent from the last sentence of the section: "And no such laborer shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required." Instances where expressions suggested by the commonest form of the subject dealt with have been held to apply to all its forms, are not uncommon in judicial decisions.

Moreover, the word "port" does not always mean a seaport when it is used in connection with our customs officers, and the word "land" is not necessarily limited to disembarkation from a ship.

It appears to be necessary for the laborer to leave this country at a place which is a port and is within the jurisdiction of a Chinese consul, and that he should return to it at a port of entry where there is a collector; but as his right to depart and return by land as well as by sea is recognized by the treaty, these places need not be seaports.

As the manifest object of this clause of the treaty was to relieve returning Chinese laborers from the consequences of sickness or casualty, the argument from inconvenience is not without weight. Detentions from these causes are quite likely to occur after the commencement of a long voyage which, in their absence, would accomplish the return before the expiration of the year. Sickness, storms, or the many mishaps of ocean travel, may require the statement mentioned in the treaty on arrival in the United States, although it seemed unnecessary before starting. These facts must have been in the minds of the framers of the treaty; yet if any other construction be adopted than that which I have indicated the unfortunate traveler would have to return to the

Agents—Comptroller of the Treasury.

place from which he started or undergo the long delay which would be required to communicate the facts to the officer at that point and receive his certificate thereof.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

AGENTS—COMPTROLLER OF THE TREASURY.

The "agent" referred to in section 3469, Revised Statutes, is one who has special charge of a claim for purposes of collection or enforcement in the same way that a district or special attorney has, though he need not possess their professional character.

While the Comptroller of the Treasury is an agent of the Government, in the broad sense of the term, he is more properly called an officer, and was not intended to be included within the word "agent" in the statute.

DEPARTMENT OF JUSTICE,

May 27, 1896.

SIR: I have the honor to give my opinion, as requested in your letter of the 14th instant, upon the question whether the Comptroller of the Treasury is an "agent" within the meaning of section 3469 of the Revised Statutes, which is as follows:

"Upon a report by a district attorney or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the Solicitor of the Treasury, the Secretary of the Treasury is authorized to compromise such claim accordingly."

I am inclined to think that "special" qualifies both attorney and agent; but whether this be so or not, the agent referred to in the statute is one who has special charge of a claim for purposes of collection or enforcement in the same way that the district or a special attorney has, though he need not possess their professional character. While the

Agents—Comptroller of the Treasury.

Comptroller and Auditors of the Treasury are agents of the Government in the broad sense of the term, they are more properly called officers, and the fact that they were not intended to be included within the word "agent" in the statute is apparent from the mention of district and special attorneys, who are also agents in the general sense. It is fair to assume that the Comptroller would have been mentioned as well as the district attorney if it had been the intention of Congress to make the statute applicable to him. While the Comptroller and Auditors may also be said to have general charge of claims in favor of the Government, they do not have charge of them in the same sense that a district or special attorney or agent has, viz, for the express purpose of directly enforcing them.

It is suggested that as the Comptroller and Auditors are the only persons who can be said ever to have charge of some claims and who have charge of all claims for a time, the result of the construction I have given the statute is to prevent compromises until the claims have been placed in the hands of an attorney or collecting agent and a report is received from him, no matter how advantageous to the Government an immediate compromise might be. But the manifest purpose of the statute was to require for your information, before acting upon a proposed compromise, the opinion and advice of a person who has given special attention to the nature, proof, and collectibility of the claim in the locality where it arose or is to be enforced. You are presumed to have all the knowledge of fact and law which your immediate subordinates possess, and the recommendation of the Solicitor, which is also required, is intended to furnish you with legal advice upon the general aspects of the claim, but none of these officers can furnish you the direct and reliable information and advice which comes from special attention to the claim or contact with the debtor.

For these reasons my opinion is that the Comptroller of the Treasury is not an "agent" within the meaning of the statute.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

Department Clerks—Departmental Practice.

DEPARTMENT CLERKS—DEPARTMENTAL PRACTICE.

The chief clerk, chiefs of bureaus, and translator in the State Department are to be appointed by the Secretary of State.

These officers are all "clerks" within the meaning of the Revised Statutes, section 169.

When departmental practice is not uniform it affords no guide to the construction of the law.

DEPARTMENT OF JUSTICE,

June 4, 1896.

SIR: I have the honor to acknowledge your communication of June 2, asking my opinion whether the chief clerk, chiefs of bureaus, and translator in your Department are to be appointed by you, or to be nominated by the President and confirmed by the Senate. The question is raised by the new civil-service rules promulgated by the President on May 6, 1896, which rules apply to the appointment of these officials in case their appointment is vested in you by law.

The Constitution provides that all officers of the United States shall be appointed by the President by and with the advice and consent of the Senate, except where, in case of inferior officers, Congress shall otherwise provide by law. If, therefore, you are vested with the appointing power in these cases, it must be by virtue of some statutory provision. (6 Opin., 1; 15 Opin., 3, 5.) If there be any such provision it must be found in section 169 of the Revised Statutes, which is as follows:

"Each head of a Department is authorized to employ in his Department such number of clerks of the several classes recognized by law * * * and at such rates of compensation respectively as may be appropriated for by Congress from year to year."

The word "employ" in this section has always been regarded as the equivalent of "appoint;" and I have approved this construction in an opinion rendered to the Secretary of Agriculture on May 26 last. The question now to be decided, therefore, is this: Are the officials mentioned in your letter among the "clerks of the several classes recognized by law" within the meaning of the section quoted? The effect of this clause is not to be confined to the four main classes of clerks mentioned in sections 163 and 167 of the revision.

Department Clerks—Departmental Practice.

These sections are reenactments of provisions of the civil and diplomatic appropriation act of March 3, 1853, chapter 97, section 3, which statute also provides separately for chief clerks and disbursing clerks of the various Departments, who, by the uniform practice of the Departments, have always been treated as clerks within the meaning of section 169. They were expressly held to be such by Attorney-General Pierrepont. (15 Opin., 3, 6.)

I think that the chief clerk of each Department is clearly a clerk within the meaning of section 169, and that the same conclusion must also be reached as to the translator, an official whose existence is recognized only in the annual appropriation act, and whose duties are purely clerical.

It remains to consider the case of the so-called chiefs of bureaus. While these officials have been recognized by statute for over twenty years, the practice of your Department has not been uniform as to the manner of their appointment. It therefore affords no guide to the construction of the law. (*Merritt v. Cameron*, 137 U. S., 542; *United States v. Healey*, 160 U. S., 136, 141-145.) You call my attention, however, to an interesting and exhaustive discussion of this subject by Mr. E. I. Renick, chief clerk of your Department, who states that while there are no officials in your Department styled chiefs of division, nevertheless your so-called chiefs of bureaus "receive the compensation and exercise the functions of chiefs of divisions." The chiefs of division in various Departments have, I believe, always been regarded as clerks, and this construction has received the approval of the Attorney-General. (15 Opin., 3, 6; 20 Opin., 728.)

I am unable to perceive any distinction between what are called divisions of the Treasury Department and what are called bureaus in your Department. Each were originally established by departmental regulations and presided over by persons who were nominally, as well as actually, Department clerks. Their being mentioned by Congress in appropriation acts, or otherwise, as chiefs of bureaus or chiefs of divisions does not take them out of the operation of section 169. The chiefs in your Department are clearly ranked as clerks in the Revised Statutes, coming between the chief clerk and the disbursing clerk. (Sec. 201.) I do not think

Revenue-Cutter Service.

they are chiefs of bureaus within the meaning of section 178. The word "bureau," like many others, is loosely used in the revision, the terminology of the codified statutes not having been made entirely definite and uniform. (See 21 Opin., 94.)

My conclusion, therefore, is that all of the officials mentioned in your communication are to be appointed by yourself, and come, therefore, within the new civil-service rules.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF STATE.

REVENUE-CUTTER SERVICE.

The Treasury Department is obliged, under existing laws, to extend the benefits of the Marine-Hospital fund to the sick and disabled officers and seamen of the Revenue-Cutter Service.

DEPARTMENT OF JUSTICE,

June 11, 1896.

SIR: I have the honor to acknowledge your letter of May 2, requesting my opinion "whether this Department is obliged, under existing laws, to extend the benefits of the Marine-Hospital fund to the sick and disabled officers and seamen of the Revenue-Cutter Service."

In my opinion of May 7, in response to a similar inquiry from you, I reviewed the legislation on the subject of Marine-Hospital Service at some length and reached the conclusion expressed in that opinion, "that the sick seamen of the Revenue-Cutter Service are entitled to the benefit of the Marine Hospital provided for sick and disabled seamen."

I have carefully reexamined the ground on which that opinion rested, in the light of the additional documents which accompany your present request.

The legislation on this subject is meager, fragmentary, and disconnected. But as early as July 16, 1798, provision was made by Congress (1 Stat., 605) for the relief of sick and disabled seamen. By that statute 20 cents per month was deducted from the wages of seamen of every ship or vessel of the United States arriving from a foreign port, and from the seamen of vessels engaged in the coasting trade. By the fourth section of this statute it was provided that any

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surplus remaining of the moneys so collected should be invested in the stock of the United States, under the direction of the President, until in his opinion a sufficient fund should be accumulated for the purchase of ground and for buildings "to be erected as hospitals for the accommodation of sick and disabled seamen."

Section 5 provides for the appointment, by the President, of "directors of the marine hospital of the United States," whose duty it shall be "to provide for the accommodation of sick and disabled seamen under such general instructions as shall be given by the President of the United States for that purpose."

By act of June 29, 1870 (16 Stat., 169), it was provided that 40 cents per month should be retained from the wages of seamen of every vessel of the United States arriving from a foreign port, or of registered vessels employed in the coasting trade.

By section 5: "That the fund thus obtained shall be employed, under the direction of the Secretary of the Treasury, for the care and relief of sick and disabled seamen employed in registered, enrolled, and licensed vessels of the United States."

By section 7: "That for the purposes of this act, the term 'vessel,' herein used, shall be held to include every description of water craft, raft, vehicle, and contrivance used or capable of being used as a means or auxiliary of transportation on or by water."

By act of March 3, 1875 (18 Stat., 485), it was provided that "every vessel subject to hospital tax, except vessels required by law to carry crew lists, shall have and keep on board, subject to inspection and verification at all times by any officer of the customs, a seaman's time book."

By section 3: "That term 'seaman,' wherever employed in legislation relating to the Marine-Hospital Service, shall be held to include any person employed on board in the care, preservation, or navigation of any vessel, or in the service, on board, of those engaged in such care, preservation, or navigation."

By section 6: "That sick and disabled seamen of foreign

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vessels and of vessels not subject to hospital dues may be cared for by the Marine-Hospital Service at such rates and under such regulations as the Secretary of the Treasury may prescribe."

By act of June 26, 1884 (23 Stat., 57):

"SEC. 15. Sections forty-five hundred and eighty-five, forty-five hundred and eighty-six, and forty-five hundred and eighty-seven of the Revised Statutes, and all other acts and parts of acts providing for the assessment and collection of a hospital tax for seamen, are hereby repealed, and the expense of maintaining the Marine-Hospital Service shall hereafter be borne by the United States out of the receipts for duties on tonnage provided for by this act; and so much thereof as may be necessary is hereby appropriated for that purpose."

By act of August 4, 1894 (28 Stat., 229), the privileges of the marine hospitals were extended to keepers and crews of the Life-Saving Service, who "shall be received in said hospitals and treated therein, and at the dispensaries thereof, as are seamen of American registered vessels."

It will be observed from this course of legislation that in the earliest act the marine hospitals were "for the accommodation of sick and disabled seamen, under such general instructions as should be given by the President of the United States."

That not until 1870 was the class of seamen to be accommodated limited to "seamen employed in registered, enrolled, and licensed vessels of the United States."

That by the act of 1875 provision was made for the accommodation of seamen of vessels other than the "registered, enrolled, and licensed vessels of the United States, under such regulations as the Secretary of the Treasury may prescribe."

It is true that revenue cutters of the United States do not fall within the class of "registered, enrolled, and licensed vessels." It does appear, however, from an official letter of Mr. Albert Gallatin, the Secretary of the Treasury, dated June 1, 1812, addressed to the collector of the port of New Orleans, that an account presented for the payment of services rendered by a private physician to the officers or crew of a revenue cutter was disallowed, "inasmuch as the crew

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of the revenue cutter are to be assisted from the hospital fund as other sailors."

It further appears from the records of the Treasury Department "that the tax for the maintenance of a marine-hospital fund was exacted and collected monthly from the seamen of the Revenue-Cutter Service from January 1, 1833, to 1884, when the tax was abolished by Congress."

It further appears from the Regulations for the Government of the United States Marine-Hospital Service, approved May 20, 1889, by the Secretary of the Treasury and by the President of the United States (p. 54), that the following regulation was prescribed and yet remains in force:

"Officers and seamen of the Revenue-Cutter Service will be admitted to care and treatment at all stations of the first class without reference to length of service and without charge."

It thus appears that from a very early period in the history of the Government the right of the officers and crew of the Revenue-Cutter Service to the privileges of the Marine-Hospital Service was recognized by the executive officers of the Government; and that for more than fifty years immediately preceding the abolition by Congress of the tax on seamen for the maintenance of the hospital fund, the seamen of the Revenue-Cutter Service were regularly assessed and taxed for this purpose.

Thus we have not only a regulation of the Department acquiesced in for a long time, but also a contemporaneous construction of the statute by those executive officers of the Government on whom has devolved the duty and responsibility of carrying the statute into effect. And we have more than this in the enforced contributions from their wages by seamen of the Revenue-Cutter Service for more than half a century to the fund by which the hospital buildings were erected and from which the hospital service was maintained.

The regulations of the Secretary of the Treasury already referred to, providing for the admission of officers and seamen of the Revenue-Cutter Service to the marine hospitals, was doubtless made in pursuance of section 6 of the act of March 3, 1875, which authorizes the admission of the sick

Attorney-General—Immediate Transportation Act.

seamen of foreign vessels and of vessels not subject to hospital duty to marine hospitals upon such terms as the Secretary of the Treasury may prescribe.

These considerations compel me to the conclusion that the Treasury Department is obliged, under existing laws, to extend the benefits of the Marine-Hospital fund to the sick and disabled officers and seamen of the Revenue-Cutter Service.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL—IMMEDIATE TRANSPORTATION ACT.

Under the immediate transportation act, the Secretary of the Treasury may require common carriers desiring to avail themselves of its privileges to file bonds to accept and transport within a definite fixed period of time all merchandise offered under the act.

The Attorney-General can not give an opinion upon a judicial question.

DEPARTMENT OF JUSTICE,
June 17, 1896.

SIR: I have the honor to acknowledge your communication of June 6, asking an opinion in relation to certain common carriers who have been authorized by you to transport merchandise in bond under the provisions of the immediate transportation act of June 10, 1880, chapter 190. This act contemplates that merchandise imported at an exterior port shall be "shipped immediately" to the port of destination (sec. 1); that the collection of duties by the United States shall be postponed until the arrival at the port of destination, the goods meanwhile being regarded as in warehouse (sec. 2; *Seeberger v. Schweyer*, 153 U. S., 609); and that to effectuate the purpose of the act the carriers are required to give bond to the United States, with such conditions, not inconsistent with law, as you may require. (Sec. 3.) One of the conditions thus imposed by you is that the carrier "shall without

Publications for Official Use—Public Printer.

delay transport and make prompt report and safe delivery of all merchandise described in each and every entry." (Customs Regulations, 1892, art. 400.) It appears, however, that bonded carriers sometimes refuse altogether to transport imported merchandise, for the reason that it is inconvenient or unprofitable to them. You ask me whether they are bound to do so.

I do not find that you are authorized by law to grant an irrevocable license to any common carrier for any period of time, or that you have attempted to do so. It is, therefore, in your power to require of every carrier, as a condition to the continuance of his privileges under the statute, the filing of a new bond containing, in unmistakable language, an agreement to accept and transport, within a definite fixed period of time, all merchandise offered under the act.

Whether or not you have any remedy against carriers who have refused transportation in the past is a judicial question. You have no power to collect damages except through the courts. The question, therefore, is not one arising in the administration of your Department within the meaning of section 356 of the Revised Statutes, and not one upon which it would be proper for me to give an official opinion. (20 Opin., 702, 714; 21 Opin., 6.)

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

PUBLICATIONS FOR OFFICIAL USE—PUBLIC PRINTER.

The head of a Department has no right under section 90 of the printing bill of January 12, 1895, to make a requisition upon the Public Printer for a greater number of copies of publications other than "bills and resolutions" than the number of bureaus in the Department and divisions in the office of the head thereof.

If he makes the requisition under the general authority vested in his Department, and with the understanding that the cost is to be charged against the printing appropriation for his Department, he has the right to make such requisition, and the Public Printer has no authority to pass upon the character of publications which he may deem essential for carrying out the work of his Department.

DEPARTMENT OF JUSTICE,

June 22, 1896.

SIR: I have the honor to acknowledge the receipt of your letter of June 18, 1896, in which you ask whether or not you have the right under section 90 of the printing bill of January 12, 1895, to make a requisition upon the Public Printer for 1,000 copies of Report No. 1049 on Senate bill No. 1552.

Section 90 is as follows:

"The heads of Executive Departments, and such executive officers as are not connected with the Departments, respectively, shall cause daily examination of the Congressional Record for the purpose of noting documents, reports, and other publications of interest to their Departments, and shall cause an immediate order to be sent to the Public Printer for the number of copies of such publications required for official use, not to exceed, however, the number of bureaus in the Department and divisions in the office of the head thereof. The Public Printer shall send to each Executive Department and to each executive office not connected with the Department, as soon as printed, five copies of all bills and resolutions, except the State Department, to which shall be sent ten copies of bills and resolutions. When the head of a Department desires a greater number of any class of bills or resolutions for official use, they shall be furnished by the Public Printer on requisition promptly made."

This section provides for furnishing to the heads of Executive Departments "documents, reports, and other publications of interest to their Departments," in a number of copies required for official use not exceeding "the number of bureaus in the Department and divisions in the office of the head thereof." It also provides for furnishing to the head of a Department "a greater number of any class of bills or resolutions for official use."

The document requested by you is not a bill or resolution, and does not come in this latter class. Under the other provision the number is limited, as above stated. It is contemplated that the documents furnished under this section are not to be charged to the printing appropriation made for the respective Departments. If you contemplate having the

Department of Agriculture—Seeds—Statutory Construction.

reports furnished under section 90, and on this basis, then, in my opinion, you have no right to make the requisition for 1,000 copies.

If, on the other hand, you make the requisition under the general authority vested in your Department, and with the understanding that the cost is to be charged against the printing appropriation for your Department, then I am of the opinion that you have a right to make such requisition, and that the Public Printer has no authority to pass upon the character of publications which you may deem essential for carrying out the work of your Department.

Respectfully,

HOLMES CONRAD,
Acting Attorney-General.

The SECRETARY OF AGRICULTURE.

DEPARTMENT OF AGRICULTURE—SEEDS—STATUTORY CONSTRUCTION.

The act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1897, authorizes the Department to pay \$130,000 for seed already put up in packages and labeled, ready for distribution.

An act of Congress should not be treated as a nullity if it can by any reasonable construction be made operative. In construing the act it is proper to consider facts which have been known to Congress and to assume that it legislated having them in view.

DEPARTMENT OF JUSTICE,

June 30, 1896.

SIR: I have the honor to acknowledge the receipt of your letter of June 18, 1896, in which you ask for an opinion as to whether the act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1897, can be carried out in spirit and in letter.

The provision in question is as follows:

“Division of seeds, purchase and distribution of valuable seeds: For the purchase, propagation, and distribution of valuable seeds, bulbs, trees, shrubs, vines, cuttings, and plants, and expense of labor, transportation, paper, twine, gum, printing, postal cards, and all necessary material and

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repairs for putting up and distributing the same, and to be distributed in localities adapted to their culture, one hundred and fifty thousand dollars. And the Secretary of Agriculture is hereby authorized, empowered, directed, and required to expend the said sum in the purchase, propagation, and distribution of such valuable seeds, bulbs, trees, shrubs, vines, cuttings, and plants, and is authorized, empowered, directed, and required to expend not less than the sum of one hundred and thirty thousand dollars in the purchase at public or private sale of valuable seeds the best he can obtain and such as shall be suitable for the respective localities to which the same are to be apportioned and in which the same are to be distributed, as hereinafter stated, and such seeds so purchased shall include a variety of vegetable and flower seeds suitable for planting and culture in the various sections of the United States.

“That section five hundred and twenty-seven of the Revised Statutes be amended so that it will read as follows:

“SEC. 527. That purchase and distribution of vegetable, field, and flower seeds, plants, shrubs, vines, bulbs, and cuttings shall be of the freshest and best obtainable varieties and adapted to general cultivation.’

“An equal proportion of two-thirds of all seeds, bulbs, trees, shrubs, vines, cuttings, and plants shall, upon their request, after due notification by the Secretary of Agriculture that the allotment to their respective districts is ready for distribution, be supplied to Senators, Representatives, and Delegates in Congress for distribution among their constituents, or be directed and mailed by the Department upon their request; and the person receiving such seeds shall be requested to inform the Department of results of the experiments therewith: *Provided*, That all seeds, bulbs, plants, and cuttings herein allotted to Senators, Representatives, and Delegates in Congress for distribution remaining uncalled for on the first of May shall be distributed by the Secretary of Agriculture, giving preference to those persons whose names and addresses have been furnished by Senators and Representatives in Congress, and who have not before, during the same season, been supplied by the Department: *And provided also*, That the Secretary shall report, as

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provided in this act, the place, quantity, and price of seeds purchased, and the date of purchase; but nothing in this paragraph shall be construed to prevent the Secretary of Agriculture from sending seeds to those who apply for the same. And the amount herein appropriated shall not be diverted or used for any other purpose but for the purchase, propagation, and distribution of valuable seeds, bulbs, trees, shrubs, vines, cuttings, and plants: *Provided, however,* That the Secretary shall not distribute to any Senator, Representative, or Delegate seeds entirely unfit for the climate and locality he represents, but shall distribute the same so that each Member may have seeds of equal value, as near as may be, and the best adapted to the locality he represents: *Provided also,* That the seeds allotted to the Senators and Representatives for distribution, in the districts embraced within the twenty-fifth and thirty-second parallels of latitude, shall be ready for delivery on the tenth day of January or at the earliest practicable time thereafter."

You say in your letter that:

"The act provides \$150,000 for the purchase, propagation, and distribution of valuable seeds, etc., including labor, transportation, paper, twine, gum, printing, postal cards, etc., but at the same time requires the Secretary to expend not less than the sum of \$130,000 in the purchase of valuable seeds alone.

"Now, as a matter of fact, it is impossible to pay the necessary expenses of preparing and distributing \$130,000 worth of seed, paper bags, printing, transportation, labor, etc., with the \$20,000 allowed by this act for the purpose, not to speak of the 'trees, shrubs, vines, cuttings, and plants' named in the act. In support of this opinion I submit herewith a statement from the disbursing officer of this Department, showing the relative amounts expended by us during several years for the purchase of seed and for all other expenses of their preparation and distribution. It will be seen that an amount greater than the amount paid for the seed is required to prepare them for distribution by Congressmen.

"The Secretary of Agriculture declined to purchase seed this year, in accordance with the advice of the Attorney-

Department of Agriculture—Seeds—Statutory Construction.

General in letter dated April 20, 1895, a copy of which is attached hereto, until Congress had, by resolution in effect March 14, 1896, instructed him to do so. In view of the lateness of the season, the Secretary then entered into contracts with two seed houses to prepare, pack, label, and deliver the seeds to the mails on orders of Congressmen. A lump sum was paid for the seed put up in papers and mail packages, with the franks pasted upon them. This could be done under the appropriation bill for 1896, but apparently can not be done under that for 1897, now under discussion. In the bill for 1896 there was no limit upon the amount that could be expended for other things than seed, such as paper packages, or for any expense of preparing the seed for distribution.

“For this reason, it appears to be doubtful whether this Department has the authority to pay \$130,000 for seed already put up in packages and labeled, ready for distribution, as was done this year. The act under consideration is very positive in declaring that \$130,000 shall be paid for seed, to the exclusion of “trees, shrubs, vines, cuttings, and plants,” and the expenses of labor, transportation, paper, twine, gum, printing, postal cards, and all necessary material and repairs for putting up and distributing the same.” It is certain that if \$130,000 were paid for “valuable seeds” alone, the remaining \$20,000 of the appropriation would be entirely inadequate to pay for putting up and distributing them, so that nothing would be left for the purchase of “trees, shrubs, vines, cuttings, and plants.”

“This act is made still more difficult of execution by the further requirement that the Secretary of Agriculture shall direct and mail the seed upon requests from Congressmen, and incur various other expenses, all of which must come out of the \$20,000 allowed for every other purpose except the purchase of valuable seeds. And this is all made more difficult still by the abolition of the statutory roll of the seed division, hitherto provided in all the appropriation bills.”

The question is not free from doubt. An act of Congress should not be treated as a nullity if it can by any reasonable construction be made operative. In construing the act it is

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proper to consider facts which must have been known to Congress and to assume that it legislated having them in view.

It must be supposed that Congress knew from the expenditures in former years that it would be entirely impossible to pack and distribute \$130,000 worth of seeds with the remaining \$20,000 of the \$150,000 appropriation, to say nothing of other expenses which were to be met out of this balance, and that for the year 1896 seeds had been purchased by your Department, put up in packages, and labeled ready for distribution. Congress had abolished the statutory roll of the seed division, and knew that you had no regular facilities for packing such a large quantity of seeds.

A conclusion that Congress intended that \$130,000 of the appropriation should be expended for seeds in bulk and unprepared for distribution would carry with it the corollary that Congress deliberately enacted a law with the purpose that it should be a dead letter, intending either that the seeds should not be purchased at all, or that after purchase they should not be distributed. Such a purpose can not be imputed to Congress.

The action of Congress in passing a joint resolution directing the purchase of seeds for 1896, and the mandatory language of the act in question, entirely negative any such idea.

It is clear beyond doubt that Congress intended the seeds to be purchased and to be distributed out of this appropriation.

I am of the opinion that the designation of such a large proportion of the entire appropriation for the purchase of seeds, made with the knowledge that the remainder would not be sufficient for packing seeds for distribution and for carrying out the other purposes expressed, was made in contemplation of the manner in which the purchase was made for 1896, and with the expectation that the \$130,000 would be expended for seeds prepared for distribution in the same way.

Respectfully,

JUDSON HARMON.

The SECRETARY OF AGRICULTURE.

Attorney-General—Foreign Law.

ATTORNEY-GENERAL—FOREIGN LAW.

The existence of a foreign law is a question of fact.

The Attorney-General can not give an opinion upon the law of a foreign nation.

As to whether a discriminating duty should be imposed under the act of 1894 upon salt imported from Germany, which country imposes a duty in the nature of an internal excise tax on salt exported from the United States. *Quære.*

DEPARTMENT OF JUSTICE,

July 2, 1896.

SIR: I have the honor to acknowledge your communication of June 20, asking a further opinion in the matter of the duties upon German salt.

Paragraph 608 of the tariff act of 1894 puts salt in general on the free list, but contains the following proviso:

“Provided, That if salt is imported from any country, whether independent or a dependency, which imposes a duty upon salt exported from the United States, then there shall be levied, paid, and collected upon such salt the rate of duty existing prior to the passage of this act.”

The Empire of Germany imposes a duty upon salt exported from the United States, and duties have up to this time continued to be levied upon German salt. Germany, however, has always claimed that its salt is entitled to free entry, for the reason that its own import duty merely countervails an excise which it levies upon all salt produced in its own territory; claiming that the exaction upon American salt, while in form a duty, is really but an excise; that there is no discrimination against American salt, and that paragraph 608, therefore, has no application. This question was submitted by you to Attorney-General Olney, who declined to give an opinion upon it, because he was not supplied with sufficient information, since the laws of Germany, “like other foreign laws, are facts to be proved by competent evidence.” (21 Opin., 80.)

Your present communication contains no statement of the facts as to the German salt excise, but states that “the data necessary to a conclusion appear to be included in the papers sent herewith.”

You inclose a translation made at the State Department of a communication recently received from the German

Attorney-General—Foreign Law.

ambassador upon this subject. This communication incloses extracts from a law of the North German Confederation (which no longer exists) bearing date October 12, 1867, relating to the excise on salt; an extract from an agreement of May 8, 1867, between certain States, since included in the German Empire, with relation to the same matter; some comments upon the constitution of the German Empire; a general statement as to laws of the Kingdoms of Bavaria and Würtemberg and the Grand Duchies of Baden and Hesse, copies of which laws are not inclosed, and a statement as to the budget of the German Empire for the fiscal year 1895-96. This communication discloses great complication in the constitutional system of that Empire, and shows that some degree of expertness is required for a correct understanding of its fiscal system.

This communication is accompanied by a letter from the Secretary of State addressed to you. This letter, however, expresses no opinion upon the questions of German law and practice which are argued by the ambassador. The Secretary of State merely says: "You will observe that the ambassador states that proof is presented by his note that American salt in Germany is placed on the same footing with German salt in respect to duties and taxes."

It is apparent, therefore, that I can not advise upon the point submitted by you without first examining the constitution of the German Empire and the legislation to which the ambassador refers, and deducing therefrom a conclusion of German law. This, however, I am not authorized to do, nor is the Department of Justice equipped for such investigation. Nothing is better settled than that the opinion of the Attorney-General can not be asked upon a question of fact; and it is equally well settled that the existence of a foreign law is a question of fact. (21 Opin., 80; *Church v. Hubbard*, 2 Cr., 187, 236; *Dainese v. Hale*, 91 U. S., 13, 20.) I do not think that Congress, in providing for official opinions by the Attorney-General, intended that he should be called upon to advise concerning questions of foreign law. He is not expected to be conversant with the various languages in which foreign legislation must be read; nor is

Public Works—Contracts.

he, like the Secretary of State, provided with an official translator for his assistance. Whether the statements of a foreign ambassador as to the true construction of the legislation of his own Government and the practice thereunder should be accepted as true, is, I think, a question to be decided by the Secretary of State and not by the Attorney-General. I do not think that you would be authorized to act upon any statement of German law coming from me. If by other means you ascertain positively that the duty upon American salt exacted by the Empire of Germany is in fact but a method of subjecting it to an excise to which it contributes equally with domestic salt, and if, upon such definite information, you are in doubt as to whether German salt is entitled to be admitted into our ports free of duty, the question presented will be one which I shall be authorized to answer.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

PUBLIC WORKS—CONTRACTS.

Under section 5 of the river and harbor act a contractor on a continuing contract work can be permitted to *earn* in one fiscal year more than \$400,000, but he may not demand or receive from the Government in any one year more than \$400,000, and must be content to remain a creditor of the Government until his money is paid as provided for in his contract, of which this act is a part.

Said section 5 is not limited in its application to cases in which the total amount authorized to be expended is more than \$400,000.

Where the total amount authorized to be expended is less than \$400,000, contractors may be allowed to earn the amounts authorized to be expended in advance of the appropriation by Congress for such work.

DEPARTMENT OF JUSTICE,

July 21, 1896.

SIR: I have your letter of July 9, in which you direct attention to certain sections and provisions of the river and harbor act, in which authority is given the Secretary of War for making "continuing contracts" for the construction and

Public Works—Contracts.

improvement of certain public works; and restrictions are imposed as to the amount to be expended annually under such contracts. You recite in your letter section 5 of the act, and submit to me the questions:

“1. Whether, under the terms of the law which limits the amount that the Secretary of War can obligate the Government for in any one fiscal year to \$400,000, and forbids him to make any obligation to pay more, a contractor on one of these continuing contract works can be permitted to *earn* more than the specified amount in any one fiscal year? In other words, can the amount of work done in any one fiscal year exceed in value the amount of money which Congress has authorized to be paid?”

Under the general law (sec. 3679, Rev. Stat.) it is provided:

“No Department of the Government shall expend, in any one fiscal year, any sum in excess of the appropriations made by Congress for that fiscal year, or involve the Government in any contract for the future payment of money in excess of such appropriation.”

Under the present statute, authority is expressly given to the head of the War Department to contract for the construction of public works in certain cases which may require many years to complete, and under the contracts so made the Government will be involved for the future payment of money largely in excess of the amount already appropriated.

The contracts will doubtless prescribe the limits of time within which the entire work, or certain specified stages thereof, shall be completed; and penalties will doubtless be prescribed for the failure on the part of the contractor to complete the whole or such portions of said work within the period prescribed.

The expenditures of money provided for in the appropriation acts of Congress are based upon the estimated annual revenues of the Government available for the objects of such appropriations.

It was doubtless considered in this particular appropriation act that however useful the works therein provided for might be, or however desirable their early completion, yet a due regard to the annual revenues of the Government would not admit of a larger annual expenditure in any case than is therein provided for.

Public Works—Contracts.

A contractor, allowed under a contract, say, three years for the completion of a certain work, can in no case receive in any one year more than \$400,000 on his contract. But, suppose that by the application of newly discovered instruments or devices he is able to accomplish in one year the work which, at the date of his contract, it was reasonably supposed would require three years for its completion, shall this contractor be permitted to economize the time to avail himself of the newly discovered appliances, and *earn* in one year what otherwise would have required three? I see nothing in the spirit, the object, or the letter of the law to forbid it. He may not demand or receive from the Government more than \$400,000 in any one year, and must be content to remain a creditor of the Government until his money is paid as provided for in his contract, of which this act is a part.

I therefore say, in answer to this question, that the contractor may perform, under his contract, in one year the work which the contract allows him three years to perform, although he may not receive full payment therefor under three years.

“2. Whether, in the case of restricted annual obligation, or in cases of continuous contracts not subject to the provisions of section 5, because the total amount authorized to be expended is less than \$400,000 (as in the case of Dunkirk Harbor, New York, on page 4 of the act), it is permissible to allow the contractor to earn the amounts authorized to be expended in advance of the appropriation by Congress for such work?”

I do not understand section 5 as being limited in its application to cases in which “the total amount authorized to be expended is more than \$400,000.” I understand the *provisos* in that section to be applicable to any contract made under the authority of this act.

I see no reason whatever why contractors under contracts where the total amount authorized to be expended is less than \$400,000 should not be allowed to *earn* the amounts authorized to be expended in advance of the appropriation by Congress for such work. Certainly the language of the act does not exclude such a construction.

In the case suggested in your letter as an illustration of the appropriation for the improvement of the harbor at

Works in Connection with Fort Taylor—Right to Possession of Real Estate.

Dunkirk, N. Y., this is a "continuing improvement"; the Secretary of War is authorized to make contracts for "such materials and work as may be necessary to complete the modified project for its improvement, to be paid for as appropriations may from time to time be made, not to exceed in the aggregate \$398,258, exclusive of the amount herein and heretofore appropriated."

Now, there it is not even stipulated that the appropriation shall be annual. The Secretary is empowered to contract for the completion of the entire work; the contract will doubtless prescribe a period within which, in the opinion of the engineer officers, such a work should be completed; but the contractor may complete it in half the time allowed. Can any reason be suggested why he should not be permitted to do so, and thereby earn the full amount contracted for and save the time that would be otherwise wasted? A contrary view would require that he should hold himself in readiness to prosecute such work only in those years and for such a length of time as Congress may see proper to provide for by appropriation.

I am of opinion that it is permissible to allow the contractor to earn the amounts authorized to be expended in advance of the appropriation by Congress for such work.

Very respectfully,

HOLMES CONRAD,
Acting Attorney-General.

The SECRETARY OF WAR.

WORKS IN CONNECTION WITH FORT TAYLOR—RIGHT TO POSSESSION OF REAL ESTATE.

17 Opinions, 7, concurred in, except in so far as that opinion held that proceedings to oust the United States from possession of the premises were not maintainable. Such proceedings, while not maintainable directly against the United States, may yet be maintained against the individuals in possession of the premises.

The United States had authority to take possession of and use real estate during the period of the war for war purposes, but had not the authority to divest the title of the owner. They had not the power to retain possession of real estate originally taken for war purposes beyond the period during which the occasion for the taking continued.

Works in Connection with Fort Taylor—Right to Possession of Real Estate.

The United States having taken possession and still retaining same, such possession can not be surrendered by the officers of the Government without authority from the Secretary of War.

If the United States, being in possession of such real estate, have been forcibly ejected—even by the lawful owner—such possession is unlawful and should be restored to the United States by a possessory action in the courts.

If the United States have abandoned such real estate and the lawful owner has entered and taken possession, his possession is lawful and should not be disturbed.

DEPARTMENT OF JUSTICE,

July 21, 1896.

SIR: I have your letter of the 16th of July, in which you state that in the summer of 1861 the Government desired to construct works in connection with Fort Taylor, for the defense of the harbor of Key West, Fla.; that the sites needed for the proposed works were owned by private individuals; that negotiations were commenced for the purchase of these sites by the Government, but the exigencies of the times and certain difficulties in procuring titles prevented the purchase "and possession was taken of the two tracts by order of the Secretary of War of September 21, 1861, reiterated December 18, 1861, and the construction of the works was commenced soon afterwards;" that the land has never been purchased by the United States, but the works were constructed thereon by the United States at great cost and still remain upon the land.

It appears that in January, 1881, the opinion of the Attorney-General was asked by the Secretary of War "if under the circumstances the United States can hold possession of the sites, exclude intruders, whether they claim to be owners or not, and force the owners to enter claims for the land either in Congress or before the Court of Claims, by which means they can obtain proper compensation for their lands." The Attorney-General expressed the opinion at that time that the United States could hold possession of the sites and exclude intruders therefrom, whether they claimed to be owners or not; and further, that no proceedings to oust the United States from the premises were maintainable. He advised that application be made to Congress for authority to acquire the title, either by purchase or condemnation, instead of forcing the owners to go to Congress for relief.

Works in Connection with Fort Taylor—Right to Possession of Real Estate.

I concur in the views expressed by my predecessor in that opinion, except in so far as he held that proceedings to oust the United States from possession of the premises were not maintainable. Such proceedings, while not maintainable directly against the United States, may yet be maintained against the individuals in possession of the premises.

The United States had authority to take possession of and use real estate during the period of the war for war purposes. They had not the authority, or the power, by any summary proceeding, to divest the title of the owner of such real estate; nor had they the power to retain possession of real estate originally taken for war purposes beyond the period during which the occasion for the taking continued.

The United States having taken possession and still retaining the same, such possession can not be surrendered by the officers of the Government without authority from the Secretary of War.

If the United States, being in possession of these sites, or either of them, have been forcibly ejected and ousted—even by the lawful owner—such possession is unlawful and should be restored to the United States by a possessory action in the courts.

The course recommended by Attorney-General Devens (17 Opin., 7), that application be made to Congress for the purchase or condemnation of this land, is, manifestly, the wisest and most just course to be pursued.

If the United States have abandoned these sites, or either of them, and the lawful owner has entered and taken possession, his possession is lawful and can not and should not be disturbed.

Very respectfully,

HOLMES CONRAD,
Acting Attorney-General.

The SECRETARY OF WAR.

Army Officers—Secretary of War.

ARMY OFFICERS—SECRETARY OF WAR.

An examination by an examining board of a lieutenant of the Army to determine his fitness for promotion, by which it was found that he was incapacitated for active service on account of certain physical disabilities, which findings were approved by the Surgeon-General, by the Major-General Commanding the Army, and by the Acting Secretary of War, but not by the President, was not such an examination as is required by law for the retirement of an officer from active service.

He could not be retired without the approval of the President.

If he recovers from such disabilities, the Secretary of War may allow him a reexamination for promotion.

The phrase "he shall be retired with the rank to which his seniority entitled him to be promoted," in the proviso to the act of October 1, 1890, is not a mandatory provision for the retirement of the disabled officer, but is for the purpose of fixing the rank with which he should be retired.

DEPARTMENT OF JUSTICE,

July 31, 1896.

SIR: I have your communication of the 20th of July, inclosing a request in writing, from the Hon. John H. Mitchell, United States Senator, with a number of other papers, presenting the case upon which you request my opinion. Among these papers is a communication of October 24, 1895, from Medorem Crawford, first lieutenant Second Artillery, Fort Schuyler, N. Y., to the Adjutant-General, United States Army (through military channels). This communication submits a protest—

"For the personal consideration of the honorable Secretary of War, against a reexamination as to his fitness for promotion of First Lieut. Edwin S. Curtis, Second United States Artillery, who has been directed by Special Orders, No. 247, paragraph 9, Adjutant-General's Office, October 22, 1895, to appear before a board of officers for such reexamination; he having already been examined by an examining board appointed by Special Orders, No. 251, Headquarters of the Army, Adjutant-General's Office, October 28, 1891, by which board he was found to be incapacitated for service by reason of physical disability contracted in the line of duty, and the proceedings of the board in his case having been duly approved by the honorable Secretary of War, and his

Army Officers—Secretary of War.

action promulgated by Special Orders, No. 102, Headquarters of the Army, Adjutant-General's Office, May 6, 1893, and the officer ordered to proceed to his home.

"I respectfully enter the above protest on the ground of the illegality of a reopening of his case by a second examination into his fitness for promotion."

It further appears, from the papers accompanying your letter, that on December 8, 1891, Lieut. Edwin S. Curtis was examined by an examining board to determine his fitness for promotion and was found incapacitated for active service on account of certain physical disabilities; that this finding was approved by the Surgeon-General and by the Major-General Commanding the Army and, on December 18, 1891, by the then Acting Secretary of War; that on the last-named date Lieutenant Curtis was notified that he *would be retired at the proper time*.

On May 6, 1893, he was ordered to his home, and on June 23, 1893, he was granted sick leave of absence until further orders.

On May 16, 1895, he applied for reexamination and submitted a surgeon's certificate showing that he had recovered his health and was then physically sound. On this application he was, with the approval of the Secretary of War, assigned to duty at Fort Trumbull, Conn.

On October 21, 1895, the action of the Acting Secretary of War, of December 18, 1891, approving the finding of the examining board, was cancelled by the Secretary of War.

The ground of the protest of Lieutenant Crawford against the reexamination for promotion of Lieutenant Curtis appears to be that the examination of December 8, 1891, when approved by the Secretary of War, December 18, 1891, became final and conclusive, and that no power or authority existed in the Secretary of War to direct or permit a reexamination of Lieutenant Curtis. He relies upon the proviso to the act of October 1, 1890—

"That should the officer fail in his physical examination and be found incapacitated for service by reason of physical disability contracted in line of duty he *shall* be retired with the rank to which his seniority entitled him to be promoted."

Army Officers—Secretary of War.

The correctness of this view must depend upon the law as it then stood, whether expressed by act of Congress or by authorized executive orders.

By act of October 1, 1890 (26 Stat., 562), entitled "An act to provide for the examination of certain officers of the Army and to regulate promotions therein," it is provided in section 3—

"That the President be, and he is hereby, authorized to prescribe a system of examination of all officers of the Army below the rank of major to determine their fitness for promotion, such an examination to be conducted at such times anterior to the accruing of the right to promotion as may be best for the interests of the service: * * * *And provided*, That should the officer fail in his physical examination and be found incapacitated for service by reason of physical disability contracted in line of duty he shall be retired with the rank to which his seniority entitled him to be promoted." * * *

This act was published in General Orders, No. 116, Headquarters of the Army, October 7, 1890.

On October 29, 1890, there was published in General Orders, No. 128, Headquarters of the Army, certain rules "prescribed by the President in accordance with section 3 of the act of Congress approved October 1, 1890. Of these Rule III is as follows:

"When the board finds an officer physically incapacitated for service it shall conclude the examination by finding and reporting the cause which, in its judgment, has produced his disability, and whether such disability was contracted in the line of duty. For the purpose of this inquiry the proceedings of the board shall conform to those of a retiring board."

By a "Circular" of December, 18, 1890, issued by order of the Secretary of War, from the Surgeon-General's Office—

"'Physical incapacity' is defined as a condition, bodily or mental, which unfits at present, or is likely to unfit in the near future, the officer for the performance of his duties."

In General Orders, No. 80, October 5, 1891, Headquarters of the Army, and in General Orders, No. 6, January 26, 1893, Headquarters of the Army, certain rules, prescribed by

Army Officers—Secretary of War.

the President in accordance with section 3 of the act of Congress approved October 1, 1890, were published for the information of those concerned.

On January 31, 1893, there were issued from the Headquarters of the Army a certain "General instructions for examining boards" for the guidance of examining boards in the examination of commissioned officers for promotion. Among these instructions is the following:

"All questions relating to the physical condition of a candidate shall be determined by the full board; and if the board finds an officer physically incapacitated the proceedings will be authenticated by the signature of the president and the recorder only."

On September 15, 1893, certain other "General instructions for examining boards" were issued from the Headquarters of the Army as follows:

"When the board finds it necessary to act in the capacity of a retiring board under paragraph 3 of General Orders, No. 128, October 29, 1890, it will, before concluding the examination for retirement, apply to the Adjutant-General for a statement of the officer's military service and any evidence which may be on file relating to the question of his disability, the same as furnished to a retiring board, and upon the receipt of such statement and evidence will proceed to thoroughly examine into the merits of the case in accordance with the requirements of sections 1248 and 1249, Revised Statutes."

Construing together the statutes and regulations providing for the promotion of officers of the Army, we find that under the act of October 1, 1890, a physical, as well as a professional, examination was provided for as a condition for promotion; and that act expressly provides that—

"Should the officer fail in his physical examination and be found incapacitated for service by reason of physical disability he shall be retired with the rank to which his seniority entitled him to be promoted."

It should be borne in mind that the title of this act is "An act to provide for the examination of certain officers of the Army and to regulate promotions therein." That title

Army Officers—Secretary of War.

correctly describes the object, purpose, and intent of the act as appears from all of its provisions.

It was not an act to provide for the retirement of officers from the Army, but merely to fix the rank of officers and "regulate promotions" in the Army.

The phrase to which Lieutenant Crawford directs attention in the third proviso to section 3 of the act, "*he shall be retired with the rank to which his seniority entitled him to be promoted,*" plainly is not a mandatory provision for the retirement of the disabled officer, but for the purpose of fixing the rank with which he should be retired. No authority was given by law to the board of examiners for promotion to retire any officer from the Army; no such authority is anywhere given to the Secretary of War.

The law providing for the retirement of officers from the Army will be found in sections 1243-1260 of the Revised Statutes.

Section 1249 provides for the report to be made by the Army retiring board.

Section 1250 provides:

"The proceedings and decision of the board shall be transmitted to the Secretary of War, and shall be laid by him before the President for his approval or disapproval and orders in the case."

Section 1251 provides:

"When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of service, and such decision is approved by the President, said officer shall be retired from active service and placed on the list of retired officers."

So that no officer can be retired from the Army upon the report of any board, even if such report be approved by the Secretary of War, except it "*is approved by the President.*"

It is true that the physical examination of an officer who is under examination for promotion may be the same in its character and extent as the physical examination of an officer who is under examination for retirement. Indeed, section 3, General Orders, No. 128, of October 9, 1890, of the rules prescribed by the President for the examination of officers for promotion requires that "for the purpose of this inquiry

Army Officers—Secretary of War.

the proceedings of the board shall conform to those of a retiring board." And this circular from the Surgeon-General of December 18, 1890, and the "General instructions for examining boards" of January 31, 1893, prescribe, with minuteness and detail, the character of such examinations.

The "General instructions" of September 13, 1893, provide that—

"When the board finds it necessary to act in the capacity of a retiring board, under paragraph 3 of General Orders, No. 128, October 29, 1890, it will, before concluding the examination for retirement, apply to the Adjutant-General for a statement of the officer's military service and any evidence which may be on file relating to the question of his disability, the same as furnished to a retiring board, and upon the receipt of such statement and evidence will proceed to thoroughly examine into the merits of the case, in accordance with the requirements of sections 1248 and 1249, Revised Statutes."

This order indicates the manner in which the examination is to be conducted, and substantially directs that it shall be the same in all respects as that provided for a retiring board.

It must be apparent, then, that no such proceedings were had in the case of Lieutenant Curtis as to effect his retirement from the Army.

The findings of the examining board of December 8, 1891, were approved by the Surgeon-General, the Major-General Commanding the Army, and by the Secretary of War; and Lieutenant Curtis "was notified that he would be retired at the proper time." But he could not be retired without the approval of the President; and even if the action of the examining board for promotion were to be regarded and treated as that of a retiring board, still it would be inoperative to effect his retirement until approved by the President.

Section 1246, Revised Statutes, provides that the Secretary of War, under the direction of the President, may assemble a retiring board, to consist of not more than nine, nor less than five officers, two-fifths of whom shall be selected from the Medical Corps. The board of examination for the promotion of officers, provided for in the rules prescribed by the President, General Orders, No. 128, October 29, 1890, shall

Secretary of War.

consist "of five members, two of whom shall be selected from the Medical Corps, and a recorder."

So that it would seem that a board constituted as a board of examination for promotion, as required to be, can not be invested with the power of a retiring board, which the law requires to be differently constituted.

On the whole, I am of opinion that the physical examination to which Lieutenant Curtis was subjected on December 8, 1891, was not such an examination as was required by law for the retirement of an officer from active service; and that no reason appears from the facts submitted to me, or from the law as it then was, or as it now is, why—upon the facts stated—the Secretary of War may not allow him a reexamination for promotion.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JUDSON HARMON.

The SECRETARY OF WAR.

STATUTORY CONSTRUCTION—SECRETARY OF WAR.

The river and harbor act of June 3, 1893, making an appropriation for the protection of the east bank of the Mississippi River opposite the mouth of the Missouri River, leaves it to the discretion of the Secretary of War whether he shall make such expenditure or not.

Language whose ordinary meaning is permissive only is sometimes held to be mandatory when other parts of the law make it plain that it was intended to require and not merely authorize.

DEPARTMENT OF JUSTICE,
August 1, 1896.

SIR: I have the honor to acknowledge the receipt of your letter of July 28, calling my attention to the following clause in the river and harbor act of June 3, 1896: "That of the money herein appropriated for the improvement of the

Statutory Construction—Secretary of War.

Mississippi River between Cairo and the mouth of the Missouri River there may be expended, under the direction of the Secretary of War, not exceeding fifty thousand dollars, or so much thereof as may be necessary, in order to improve the channel of the river, and to protect the east bank of the Mississippi river from caving in and being washed away at or near a point opposite the mouth of the Missouri River and extending south along said east bank, and thirty thousand dollars, or so much thereof as may be necessary, shall be expended in removing the bar in front of Chester, Illinois, and protecting the west bank of the Mississippi opposite Chester," and asking my opinion whether the expenditure of the \$50,000, provided in the item quoted, for protecting the east bank of the Mississippi River at a point opposite the mouth of the Missouri, is virtually ordered by Congress, or is the expenditure of the amount left to the discretion of the Secretary of War.

While language whose ordinary meaning is permissive only, like that in the clause in question, has sometimes been held to be mandatory when other parts of the law made it plain that it was intended to require, and not merely authorize, my opinion is that the permissive form was here used with the deliberate intention of leaving to your judgment the question whether any of the sum named should be expended; and if so, how much. Your attention is called by Congress to the condition of the channel and the east bank of the Mississippi at the point named, and it is made your duty, if that condition be found to be as reported to Congress, to proceed with the expenditure authorized if, in your judgment, an improvement of that condition may fairly be expected to result. Otherwise you are left at liberty to leave the appropriation unexpended.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF WAR.

Civil Service.

CIVIL SERVICE.

Section 4415, Revised Statutes, so far as it prescribes the method by which vacancies on the board of inspectors of hulls of steam vessels shall be filled, was repealed by the civil-service act and the board provided by said section can not act as a board of examiners under the civil-service act, unless the members of such board are selected and appointed as such board of examiners under section 5, Rule IV.

DEPARTMENT OF JUSTICE,

August 10, 1896.

SIR: I have yours of the 6th instant, stating that a vacancy exists in the Steamboat Inspection Service of inspector of hulls of steam vessels at San Francisco, and submitting for my opinion the question "whether the Civil Service Commission can use the board provided by law, section 4415, Revised Statutes, and make them a civil-service examining board under its provisions, or whether the civil-service law and rules abrogate that statute as far as these places are concerned."

By act of January 16, 1883, entitled "An act to regulate and improve the civil service of the United States" (22 Stat., 403):

"SEC. 7. That after the expiration of six months from the passage of this act no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said statutes; nor shall any officer not in the executive branch of the Government or any person merely employed as a laborer or workman be required to be classified hereunder; nor, unless by direction of the Senate, shall any person who has been nominated for confirmation by the Senate be required to be classified or to pass an examination."

Letters Outside of the Mails Carried by Railroad Companies—Statutory Construction.

The rules here referred to are those provided for in section 2 of said act.

Pursuant to the authority and requirement of said act and of section 1753, Revised Statutes, the President did, on May 6, 1896, approve certain rules which have been duly promulgated and all other rules revoked.

By Rule III the departmental service was made one of the branches of the classified executive civil service of the United States and includes therein the officers and employees of the Steamboat Inspection Service.

By Rule IV, section 2, it was provided:

“No person shall be appointed to, or be employed in, any position which has been, or may hereafter be classified under the civil-service act, until he shall have passed the examination provided therefor, or unless he is especially exempt from examination by the provisions of said act or the rules made in pursuance thereof.”

Section 5 authorizes the Civil Service Commissioners to “appoint from persons in the Government service such boards of examiners as it may deem necessary.”

I am of opinion, then, that section 4415, Revised Statutes, so far as it prescribes the method by which vacancies on the board of inspectors of hulls of steam vessels shall be filled, is repealed by the civil-service act, and the board provided by section 4415, Revised Statutes, can not act as a board of examiners under the civil-service act unless the members of such board are selected and appointed as such board of examiners under section 5, Rule IV.

Very respectfully,

HOLMES CONRAD,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

LETTERS OUTSIDE OF THE MAILS CARRIED BY RAILROAD COMPANIES—STATUTORY CONSTRUCTION.

Sections 3985 and 3993, Revised Statutes, are not in derogation of common right. They are revenue laws and are not to be strictly construed, though they impose penalties.

Letters Outside of the Mails Carried by Railroad Companies—Statutory Construction.

Railroad companies can not set up any "common right" against the conditions which the law incorporates in their contracts with the Government.

The public interest requires that the Government should have a monopoly of the business of carrying letters, etc.

Letters and packets relating to the business of the railroad on which they are carried may be carried by such railroad outside of the mails, not in Government stamped envelopes. The right is to carry letters written and sent by the officers and agents of the railroad company which carries and delivers them, about its business, and these only. They may be letters to others of its officers and agents, to those of connecting lines, or to anyone else, so long as no other carrier intervenes. It has no right to transport letters for a third person.

Letters of a company addressed to officers or agents of a connecting line on company business and delivered to an agent of the latter at the point of connection may be carried by the latter to any point on its line, because such letters become its own on receipt by any one of its agents.

Any company, or any officer or employee thereof, carrying letters which are neither written by that company nor addressed to it, is liable to the penalties imposed by law.

The officer or agent of the person or company sending letters to be carried contrary to law is it seems also liable.

A company may not carry letters from one of its connecting lines to another when they relate to through business over the lines of all. Such letters do not "relate to its business" within the meaning of the postal regulations.

The expression "private hands," in section 3992, Revised Statutes, was intended to cover all except common carriers on post routes. Neither the latter nor their employees can be considered as "private hands" under this section, and if they could be, the express or implied obligation of railroads to carry letters for each other to remotely connecting lines would amount to "compensation" within the meaning of the statute.

The denial of the right of railroad companies to carry letters between other companies with whose lines their own connect applies also to the carrying of letters by railroad companies for companies, corporations, or private individuals, operating car lines, transportation lines, hotels, restaurants, or any class of business that may either be connected with or not connected with the railroad proper.

DEPARTMENT OF JUSTICE,

August 12, 1896.

SIR: Your letter of the 3d instant supplies the defects in that of July 29, to which I called your attention, by submitting the specific questions on which you ask my opinion.

Letters Outside of the Mails Carried by Railroad Companies—Statutory Construction.

I have the honor, therefore, now to comply with your request. The delay has been chiefly due to the desire of counsel at a distance to present their views, which I was glad to gratify for my own benefit as well as in fairness to those whose interests are involved.

You submit your order No. 422, dated July 2, 1896, relative to the sending and carrying by railway companies of "letters outside the mails and not inclosed in Government stamped envelopes, and which do not relate to the cargo being carried on the train." The order quotes sections 3985 and 3993 of the Revised Statutes, declares that "the carrying of such letters outside the mails is in direct violation" of those sections, and threatens prosecution of all persons concerned therein. The sections cited are as follows:

"SEC. 3985. No stage coach, railway car, steamboat, or other vehicle or vessel which regularly performs trips at stated periods on any post route, or from any city, town, or place to any other city, town, or place, between which the mail is regularly carried, shall carry, otherwise than in the mail, any letters or packets, except such as relate to some part of the cargo of such steamboat or other vessel, or to some article carried at the same time by the same stage coach, railway car, or other vehicle, except as provided in section three thousand nine hundred and ninety-three; and for every such offense the owner of the stage coach, railway car, steamboat, or other vehicle or vessel shall be liable to a penalty of one hundred dollars; and the driver, conductor, master, or other person having charge thereof, and not at the time owner of the whole or any part thereof, shall for every such offense be liable to a penalty of fifty dollars.

"SEC. 3993. All letters enclosed in stamped envelopes, if the postage stamp is of a denomination sufficient to cover the postage that would be chargeable thereon if the same were sent by mail, may be sent, conveyed, and delivered otherwise than by mail, provided such envelope shall be duly directed and properly sealed, so that the letter can not be taken therefrom without defacing the envelope, and the date of the letter or of the transmission or receipt thereof shall be written or stamped upon the envelope. But the

Letters Outside of the Mails Carried by Railroad Companies—Statutory Construction.

Postmaster-General may suspend the operation of this section upon any mail route where the public interest may require such suspension."

You refer me to section 3992 also, which is as follows:

"Nothing herein shall be construed to prohibit the conveyance or transmission of letters or packets by private hands without compensation, or by special messenger employed for the particular occasion only."

You ask: (1) "Can the railroad companies carry, outside of the mails, not in Government stamped envelopes, any first-class mail matter except such as concerns the cargo carried by the road?"

(2) "Is it proper for a railroad company to carry, outside of the mails, not in Government stamped envelopes, first-class mail matter intended for a connecting line?"

(3) "Is it proper for a railroad company to carry, outside of the mails, first-class mail matter not in Government stamped envelopes, for companies, corporations, or private individuals operating car lines, transportation lines (either passenger or freight), operating hotels, restaurants, or any other class of business that may either be connected or not connected with the railroad proper?"

(4) "Can such companies as mentioned in the third question carry their own mail; and if so, under what circumstances?"

Section 1022 of the Postal Laws and Regulations of 1893, after prohibiting the carriage of letters and packets according to sections 3985 and 3993, excepts such as relate "to the business of the railroad on which they are carried." You state that this clause has been found in all the postal regulations for many years, until it has become the settled construction by your Department of the laws now embodied in these sections; and that you are therefore not disposed to insist on the strict construction of your order, which would reverse that construction, unless the law requires you to do so.

You say, however, that the railroad companies of the country have given so broad a construction to the clause just quoted that a system of railway letter service has grown up of such proportions that it carries substantially all the

Letters Outside of the Mails Carried by Railroad Companies—Statutory Construction.

correspondence of railway officers and employees, and those of kindred organizations, on all subjects connected with railroad business, and that regular offices for the distribution and routing of this railway mail are established at all large terminal points.

I do not think these statutes are in derogation of common right, and therefore to be strictly construed as stated in *United States v. United States Express Co.* (5 Biss., 91). They are revenue laws (*United States v. Bromley*, 12 How., 96), and are not to be strictly construed, though they impose penalties. (4 Opin., 159; *United States v. Hodson*, 10 Wall., 406; *United States v. Stowell*, 133 U. S., 12.) Certainly railroad companies can set up no "common right," if such they have, against the conditions which the law incorporates in their contracts with the Government. The intention of the law was to secure to the Government a monopoly of the business of carrying letters, etc., which the public interest requires it to do in some regions at a loss, which might become too great a burden if it should be deprived of any portion of the business elsewhere. (See 9 Opin., 161, and 14 Opin., 152.)

But, whatever rule of construction be applied, I think the long-settled rule of your Department, taken as meant, carries out the intention of the law. Read literally, section 3985 would forbid the carrying of any letters or packets outside the mails besides those covered by the express exceptions. But your predecessors who adopted and have maintained the rule above mentioned, looking to the object which Congress manifestly had in view, construed the law as applying only to carriage for other persons. This construction seems to be sustained by the glimpse into the minds of the framers of the law which the expressed exceptions afford, as well as by other sections of the law relating to the same general subject. (See secs. 3982-3984 and 4 Opin., 159.) Section 3992 also confirms this view, both the exceptions it makes plainly relating to carriage for third persons, as appears from the reference to compensation in one case and employment in the other.

Congress evidently had no thought of interfering with the private methods of carriers on post routes for communicating

Letters Outside of the Mails Carried by Railroad Companies—Statutory Construction.

directly with their own employees or with other persons. It was dealing only with their public business of carrying for others. Therefore no exception was required in this respect and no argument is to be drawn from its omission from the expression of exceptions.

In view of the language of the law and the plain right of Congress to require all letters carried on post routes by public carriers to go in the mails, the right of railroads to carry their own letters must rest alone on the reason above given, which also furnishes the limitation of the right by its very definition. Even if the enjoyment of the right were deduced from lack of authority in Congress to interfere with it, rather than from absence of intention to do so, the same result would follow. The right is to carry letters written and sent by the officers and agents of the railroad company which carries and delivers them, about its business, and these only. They may be letters to others of its officers and agents, to those of connecting lines, or to anyone else, so long as no other carrier intervenes. The moment this occurs, such other carrier is transporting letters for a third person. It has no natural right to do this, as it is asserted to have with respect to its own letters; and as to letters other than its own, no exception is permissible beyond those expressed in the statute.

The clause above quoted from the postal regulations was manifestly not intended to do more than carry out the law. Otherwise it would, of course, be invalid. But taken not to refer to letters of others than the carrying company, it is consistent and proper. Such, I am confident, was the meaning intended.

Of course, letters of a company addressed to officers or agents of a connecting line on company business, and delivered to an agent of the latter at the point of connection may be carried by the latter to any point on its line, because such letters become its own on receipt by any one of its agents, and transfer to another agent, without the intervention of another carrier, comes within the principle already expressed. But any company, or any officer or employee thereof, carrying letters which are neither written by that company nor addressed to it, is liable to the penalties imposed by the law.

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The officer or agent of the person or company sending letters to be carried contrary to the law is, it seems, also liable. (See *United States v. Hall*, 9 Am. Law Reg., 232, and R. S., sec. 5440.)

I am unable to reconcile with this view of the law the claim that a company may carry letters from one of its connecting lines to another when they relate to through business over the lines of all. This claim proceeds on the theory that the carrying company's interest, actual or possible, in the subject of the correspondence makes the letter "relate to its business," in the language of the postal regulations. But, as I have said, this language was used with reference to letters sent by or addressed to the carrying company, or on its behalf, and the form of expression adopted was doubtless merely intended to exclude private correspondence between persons in the employ of carriers. Otherwise the regulation, like the claim based on it, would be contrary to the law. In *United States v. Bromley* (*supra*) an order for goods to be brought by a steamboat on its return trip was held to have been wrongfully carried, although the carrier had a direct interest therein.

Congress certainly expected that the postal authorities would inspect letters, etc., transported by carriers not in the mails nor in stamped envelopes, in order to prevent and punish violations of law. (See secs. 3990 and 4026, and *Blackham v. Gresham*, 16 Fed. Rep., 609.) It is difficult to attribute to Congress an intention to make the conduct of these officers depend on so difficult an inquiry as that involved in determining whether the carrier has an interest in the subject of correspondence to which it is not a party. While a somewhat similar inquiry may be required for the detection of private correspondence between railway employees, it can be readily conducted by mere inspection of the letters, unlike investigation as to the carrier's interest in subjects of correspondence between other companies. Besides, such inquiry as to private correspondence is unavoidable; while mere inspection of the envelopes will generally enable inspectors to decide whether letters are by or to the carrier itself or its agents acting for it. It would be equally impossible for a carrier to determine, as it must do in order to avoid violations of the law, whether letters sent

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by one of its connecting lines to another relate wholly to business in which it has a specific interest. The view contended for seems to require the assumption that each connecting carrier has such interest in all correspondence between other companies about through business done or expected. This assumption is unwarrantable in view of *United States v. Bromley (supra)*.

I do not think section 3992 has any bearing on this point. "The conveyance or transmission of letters or packets by private hands without compensation" must, of course, be held to refer to something different from conveyance or transmission "by special messenger employed for the particular occasion;" but "private hands" was evidently intended to cover all except common carriers on post routes. Neither the latter nor their employees, while engaged in their business, can be considered as "private hands" under this section, and, if they could be, my opinion is that the express or implied obligation of railroads to carry letters for each other to remotely connecting lines would amount to "compensation" within the meaning of the statute. I do not understand it to be contended that the clause relating to special messengers is relevant here.

The suggestion you make that the right of railroad companies to carry their own letters to connecting lines is liable to abuses which are difficult to detect can not be considered. It is not to be assumed that anyone will violate the law, when it is clearly understood, and communications from one connecting line to another and communications from it to the next, though on the same subject, come clearly within the right of carriage outside of the mails and without stamps.

Nor can I give weight to the inconvenience which, it is alleged by some of the counsel who have been heard, will result to the railways and their patrons from the abolition of what may be termed "through railway mail," which this opinion requires. Assuming the superior promptness and efficiency of this service, which is asserted, it may be that its abolition will result in the improvement of the public mail service. At any rate, such considerations can not affect what I consider the evident meaning of the law.

Attorney-General—Duties.

It is manifest that what I have said in denying the right of railroad companies to carry letters between other companies with whose lines their own connect applies also to the carriage of letters by railroad companies for the class of persons, associations, and companies mentioned in your third question, and that the right of such persons, associations, and companies to carry their own mail is defined and limited like that of railroad companies.

Having answered all your questions generally, I deem it unnecessary to answer them in detail.

Respectfully submitted.

JUDSON HARMON.

The POSTMASTER-GENERAL.

ATTORNEY-GENERAL—DUTIES.

A question which was referred to the Comptroller of the Treasury, and at his request referred to the Attorney-General, answered by the Attorney-General, because it is an important one.

On an application for an abandonment to the United States of dutiable goods, in accordance with the provisions of section 23 of the customs administrative act of June 10, 1890, the decisions of the collector and Board of General Appraisers, if it was the importers' duty to protest, are conclusive, if the importers took no appeal, and a refund, asked by the importers on the ground that the rulings of the collector and Board of General Appraisers were erroneous under a subsequent ruling of the Treasury Department in another case and a still later opinion of the Attorney-General, will not be allowed.

An application for an abandonment under section 23 of said customs administrative act does not present an "administrative question" as to which the decision of the collector is final.

DEPARTMENT OF JUSTICE,

August 18, 1896.

SIR: I have the honor to acknowledge your communication of August 3, asking an official opinion concerning the application of the E. L. Goodsell Company for a refund of duties.

It appears that this company imported fifty boxes of lemons April 5, 1895, at the port of New York. On April 11 an application was filed with the collector of the port for an

Attorney-General—Duties.

abandonment to the United States of these lemons in accordance with the provisions of section 23 of the customs administrative act of June 10, 1890. At that time this section was construed by your Department as permitting abandonment only in the case of damaged goods. The application was therefore referred to an appraiser for the purpose of ascertaining whether the goods were damaged. This official, upon taking up the case, found that the goods, which had been lying on a wharf in Jersey City, had been dumped by directions of the board of health of that city. The collector declined to grant any relief to the importers in the premises. The latter thereupon filed a protest under the provisions of section 14 of the customs administrative act. The case thus came before the General Appraisers, who sustained the collector's decision "in view of the fact that the importers had presented no evidence in support of their claim other than a certificate of the board of health to the effect that the goods had been condemned and sent to the dump." The importers took no appeal.

It was subsequently ruled by your Department in another case that such a certificate of the board of health would be accepted as sufficient evidence; and still later, by an opinion rendered April 10, 1896, the present Attorney-General has held that the question of damage is altogether immaterial, and that importers have a right to abandon goods, whether damaged or not, if amounting to 10 per cent or over of the total value or quantity of an invoice. It must, therefore, now be assumed that the decisions of the collector and of the Board of General Appraisers in the present case were erroneous, and I assume, also, that the lemons were still in existence on April 11, so that no question arises as to whether an abandonment within the meaning of section 23 can be made after the goods are already destroyed.

The importers having asked a refund, the question was referred to the Comptroller of the Treasury; but as it is an important one, it is now referred to this Department at his request. (See opinion of September 21, 1895.)

The rulings of the collector and of the Board of General Appraisers were plainly not due to any mutual mistake of

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fact. They must be assumed to have been due to "an erroneous view of the facts in the case" within the meaning of the act of March 3, 1875, chapter 136, section 1; and hence, if it was the importers' duty to protest, are conclusive, because the protest taken by them at the time was not followed up by an appeal. (Opinions of September 11 and November 8, 1895.)

It is suggested, however, that an application for abandonment under section 23 presents an "administrative question," as to which the decision of the collector is final and not subject to review by the Board of General Appraisers, and that therefore there could be no protest in such a case. The collector's decision, however, clearly relates to the rate and amount of duties chargeable. It is hence subject to review by the General Appraisers under sections 13 and 14 of the customs administrative act as construed by Attorney-General Olney in 21 Opinion, 92, 95.

I do not think that *United States v. Klingenberg* (153 U. S., 93), properly understood, is in conflict with this construction. Notwithstanding some language in the opinion in that case, I do not think that the court intended to hold the question then presented to be a jurisdictional one in the strict sense of that term. The court held a certain proclamation by the Secretary of the Treasury to be conclusive as to the value of the Austrian florin; but had the collector's construction of that proclamation been erroneous instead of correct, and had the collector thus disobeyed the proclamation instead of obeying it, I do not understand it to be settled that the Board of General Appraisers would have been without jurisdiction to correct the error. (*Wood v. United States*, 72 Fed. Rep., 254, 257; compare opinion of November 26, 1895.)

I therefore have the honor to advise you that the Board of General Appraisers had jurisdiction to review the collector's decision in the present case, and that the action of the Board was final for all purposes, since the importers did not appeal. This is sufficient to dispose of the case.

Very respectfully,

EDWARD B. WHITNEY,

Acting Attorney-General.

THE SECRETARY OF THE TREASURY.

Statutory Construction—Public Printer—Comptroller of the Treasury—Attorney-General.

STATUTORY CONSTRUCTION — PUBLIC PRINTER — COMPTROLLER OF THE TREASURY—ATTORNEY-GENERAL.

It is a general rule of statutory interpretation that in cases of apparent conflict the more specific provisions should govern, and this is especially the case when the specific provisions follow the general one. Under section 56 of the public printing and binding act of January 12, 1895, chapter 23, the Public Printer should print in slip form and distribute 760 copies of private laws, postal conventions, and treaties. To what appropriation the expense of these copies is to be charged is a question which may be asked of the Comptroller of the Treasury, and should not be answered by the Attorney-General.

DEPARTMENT OF JUSTICE,

August 31, 1896.

SIR: I have the honor to acknowledge your communication of July 18 relating to the questions in controversy between your Department and the Public Printer respecting the proper construction of the public printing and binding act of January 12, 1895, chapter 23. This act is long and complicated; but I am informed by the Public Printer that he does not desire to submit an argument upon these questions, so that I am obliged to pass upon them without knowing the ground upon which he made the rulings of which you complain.

Section 56 of the act provides that there shall be printed in slip form 460 copies of Private Laws, Postal Conventions, and Treaties, which shall be distributed as follows: To the House document room, 100 copies; to the Senate document room, 100 copies; to the Department of State, 500 copies; to the Treasury Department, 60 copies. Adding up these specifications gives a total of 760 copies, or 300 more than the total as given in the statute. The Public Printer refuses to supply more than 460 copies all told; and he deducts the whole shortage of 300 from the quota of your Department. I am unable to perceive any justification for charging the whole deficit to your Department and deducting nothing from the quotas of the House and Senate document rooms or of the Treasury Department. This action seems to me purely arbitrary. I am further of the opinion that the Public Printer should print and distribute 760 copies. It is a general rule of statutory interpretation that in cases of apparent conflict

Statutory Construction—Public Printer—Comptroller of the Treasury—Attorney-General.

the more specific provision should govern; and this is especially the case when the specific provisions follow the general one. (Endlich on Interpretation of Statutes, sec. 183.) No case can be clearer than the present for the application of these rules.

Section 90 of the act gives you the right to call upon the Public Printer for such copies as you may require for official use of Government publications, "not to exceed, however, the number of bureaus in the Department and divisions in the office of the head thereof." The question arising upon this section is, whether the expense of these copies is to be charged to the appropriation for your Department or to the general fund for public printing.

This is a question which may be asked of the Comptroller of the Treasury. (Act of July 31, 1894, chap. 174, sec. 8.) It belongs to a class of questions which require for their decision a special knowledge of our appropriation acts and the course of decisions thereunder. "They are questions which the Comptroller, by his great experience, is better qualified to pass upon, and it is desirable to avoid any possible conflict of precedents. Therefore it seems to me inadvisable for me to attempt to pass upon these inquiries." (21 Opin., 179.)

Very respectfully,

JUDSON HARMON.

The SECRETARY OF STATE.

OPINIONS
OF
HON. JUDSON HARMON, OF OHIO,
AND
HON. JOSEPH McKENNA, OF CALIFORNIA.

CIVIL SERVICE—SECRET AGENTS.

The confidential agents formerly employed in the free-delivery division of the Post-Office Department, and designated secret agents, did not become classified employees of the departmental service within Rule III of the civil-service rules promulgated May 6, 1896.

This rule covers only those employees who are to be regarded as appointed for service in the departments at the seat of Government (whether for the time being actually employed there or detailed for service elsewhere), as distinguished from those appointed for service in the States or Territories, or, as in the case of the Railway Mail Service, in the country at large.

DEPARTMENT OF JUSTICE,
September 10, 1896.

SIR: I have the honor to acknowledge your communication of August 29, asking my opinion as to whether the confidential agents formerly employed in the free-delivery division of your Department, and designated secret agents, became classified employees of the departmental service within Rule III of the civil-service rules promulgated May 6, 1896. These agents were employed at the rate of \$5 per diem and expenses under the general appropriation "for free-delivery service" for the fiscal year ending June 30, 1896. (Post-Office appropriation act of February 28, 1895, ch. 140; 28 Stat., 691.)

This rule includes in the departmental service all employees of whatever designation, "however or for whatever purpose employed, whether compensated by a fixed salary or otherwise, who are serving *in or on detail from* the several executive departments, commissions, and offices *in the District of Columbia.*"

Arrears of Pension—Statutory Construction.

This clause does not cover all of the employees of your Department, as is shown, among other things, by the fact that the Railway Mail Service is separately mentioned. I think that it covers only those who are to be regarded as appointed for service in the departments at the seat of Government (whether for the time being actually employed there or detailed for service elsewhere), as distinguished from those appointed for service in the States or Territories, or, as in the case of the Railway Mail Service, in the country at large.

I think that these secret agents, like the employees of the Railway Mail Service, must be regarded as appointed for the country at large; as I understand their occupation to have been a roving one, inspecting the letter-carrier service in different parts of the country, and not having any special relation to the service in the District of Columbia. Otherwise the question might be raised whether their appointment did not conflict with the act of August 5, 1882, chapter 389, section 4.

I am therefore of the opinion that these agents were not classified under the present civil-service rules.

Very respectfully,

JUDSON HARMON.

The POSTMASTER-GENERAL.

ARREARS OF PENSION—STATUTORY CONSTRUCTION.

The provision of section 4724 of the Revised Statutes "that no person in the Army, Navy, or Marine Corps, shall be allowed to draw both a pension as an invalid and the pay of his rank or station in the service" is not applicable to an officer upon the retired list.

If a statute is ambiguous, a long-established construction thereof by the department charged with its execution, if continuous and consistent, will be regarded as conclusive.

Under the pension appropriation acts of 1890 and 1891 no pension monies can be drawn by retired officers of the Army, Navy, or Marine Corps after August 29, 1890, but these two statutes are not to be given a retrospective effect so as to cut off arrears already due.

DEPARTMENT OF JUSTICE,

September 11, 1896.

SIR: I have the honor to acknowledge your communication of September 4, relating to the opinion previously asked

Arrears of Pension—Statutory Construction.

with relation to the claim of Col. John Pulford, formerly of the Fifth Michigan Volunteer Infantry, for certain arrears of pension.

It appears that Colonel Pulford, while in the volunteer service during the rebellion, received two severe gunshot wounds, on July 1, 1862, and May 5, 1864, respectively; that on account of these wounds he was placed upon the pension list June 15, 1866, his pension dating from July 17, 1865; that on February 23, 1866, he was appointed second lieutenant in the Regular Army; that he has received his pension from July 17, 1865, to February 23, 1866; that he did not thereafter claim further pension payments until very recently, apparently believing that he was disqualified from receiving them by reason of section 4724 of the Revised Statutes; that he was retired from active service on December 15, 1870, and that this retirement was based upon a medical examination which proved that he was incapacitated for active service through the result of the wounds for which he had theretofore been pensioned.

It is not questioned by anybody that during his service in the Regular Army from 1866 to 1870 Colonel Pulford was disqualified from drawing any invalid pension by reason of the final proviso to the pension appropriation act of April 30, 1844, chapter 15, which is as follows:

“That no person in the Army, Navy, or Marine Corps shall be allowed to draw both a pension as an invalid and the pay of his rank or station in the service, unless the alleged disability for which the pension was granted be such as to have occasioned his employment in a lower grade or in some civil branch of the service.”

This section was thereafter reenacted as section 4724 of the Revised Statutes. The first question presented by Colonel Pulford's application is whether this statutory provision was applicable to an officer upon the retired list, as he seems then to have supposed. The Assistant Secretary of the Interior decided this question in the affirmative, and for this reason, among others, has held that the present claim has properly been rejected; but upon a motion for a reconsideration, you have asked me to review his decision. Upon the

Arrears of Pension—Statutory Construction.

face of the statute I agree entirely with the Assistant Secretary; and if the question were *res nova*, would be clearly of the opinion that Colonel Pulford was a "person in the army" within the statutory meaning. (*United States v. Tyler*, 105 U. S., 244; *Badeau v. United States*, 130 U. S., 439, 451.)

The construction of this provision, however, I think is governed by an element which seems not to have been brought to the attention of the Assistant Secretary, namely, that of long-established departmental practice. It appears that the Pension Bureau always construed these provisions as not applicable to retired officers; that in 1890, 300 of such officers were thus actually upon the roll drawing invalid pensions, as well as their retired pay, and that the practice continued until stopped in that year by an act of Congress, hereinafter mentioned.

If there be any ambiguity in a statute, a uniform practice of this kind, continuing for a quarter of a century, ought to be conclusive. (*Robertson v. Downing*, 127 U. S., 607, 613, and cases cited; *United States v. Healey*, 160 U. S., 136, 145.) Departmental practice under an act of Congress has an effect similar in this respect to Congressional practice under an ambiguous statutory provision. (*The Laura*, 114 U. S., 411, 416, and cases cited; *McPherson v. Blackie*, 146 U. S., 1, 27.) The weight to be given to departmental practice is greatly increased when Congress, in reenacting the law, fails to indicate in any way its disapproval of the settled construction, to which it is thus regarded as giving an implied approval. (18 Opin., 532; 20 Opin., 721; 2 Comp. Dec., 100.) The opinions just cited are those of executive officers only, but the first of them has been referred to with apparent approval by the Supreme Court. (*Earnshaw v. Cadwalader*, 145 U. S., 247, 258.)

There is, indeed, an exception to this rule when the statute is not ambiguous and the departmental practice clearly defeats its obvious purpose. (*United States v. Tanner*, 147 U. S., 661, 663; *United States v. Alger*, 152 U. S., 384, 397; *Webster v. Luther*, 163 U. S., 331, 342; 20 Opin., 593.) I think, however, that the statute now under consideration is not sufficiently clear to bring it within this exception to the rule, especially when the cause for which the pensioner was

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retired from active military service and reduced in pay was the very same "disability for which the pension was granted."

For the reasons above stated, I think that Colonel Pulford is entitled to his pension, unless he has been deprived thereof by subsequent legislation. Two statutes have been referred to as having this effect. The pension appropriation act of August 29, 1890, chapter 820, section 2, provided as follows:

"Hereafter no officer of the Army, Navy, or Marine Corps on the retired list shall draw or receive any pension under any law."

The pension appropriation act of March 3, 1891, chapter 548, contains the following proviso:

"That hereafter no pension shall be allowed *or paid* to any officer, noncommissioned officer, or private in the Army, Navy, or Marine Corps of the United States, either on the active or retired list."

It is incontestable that under this proviso no pension moneys can be drawn which would otherwise have become payable after August 29, 1890. These two statutes, however, are not necessarily to be construed as intended to cut off arrears already due to persons who were already on the pension roll. No principle of statutory construction is better settled than that words should not have a retrospective operation "unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature can not be otherwise satisfied." (*United States v. Heth*, 3 Cr., 314; *Sohn v. Waterson*, 17 Wall., 596, 598; *Twenty Per Cent Cases*, 20 Wall., 179, 187.) It must be conceded that the language of these statutes of 1890 and 1891 is strong. The question is difficult. Still, I do not think that I am required to give a retrospective effect to the statute in this particular. The object of Congress was to put a stop to the practice for the future. I do not think that it was intended to cut off the few pensioners who had not yet applied for the sums already due. The language of the proviso above quoted is much like that of the statute considered in *Miles Planting Co. v. Carlisle* (5 D. C. App., 138); but that case related to sums not yet accrued at the passage of the act.

Alien Officers on Vessels—Statutory Construction.

It is therefore my opinion that the applicant is entitled to his arrears of pension up to and including the last quarterly payment falling due prior to August 29, 1890.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE INTERIOR.

[NOTE.—For a reconsideration of the question involved in this opinion, see 21 Opin., 453. E. C. B.]

ALIEN OFFICERS ON VESSELS—STATUTORY CONSTRUCTION.

If there be any ambiguity in a statute, a uniform departmental practice should be regarded as having settled the law.

A tax on a vessel employing as mate an alien, imposed under section 4219 of the Revised Statutes, which provides that a "vessel any officer of which shall not be a citizen of the United States shall pay a tax of 50 cents per ton," should not be remitted because such alien had duly declared his intention of becoming a citizen of the United States and had for more than three years continuously served on board American merchant vessels, but has never actually been admitted to citizenship.

DEPARTMENT OF JUSTICE,

September 15, 1896.

SIR: I have the honor to acknowledge your communication of August 25, requesting an opinion with relation to the case of one Joseph Sjo, an alien employed as mate upon the American schooner *Lucy*, of San Francisco. It appears that on February 26, 1892, this seaman duly declared his intention of becoming a citizen of the United States, and that from that date he has continually served on board American merchant vessels; but apparently, for some reason, he has never actually been admitted to citizenship. On account of his employment as mate, you have imposed upon the schooner a tax of \$147 under the final clause of section 4219 of the Revised Statutes, which is as follows:

"And any vessel, any officer of which shall not be a citizen of the United States, shall pay a tax of fifty cents per ton."

The legality of this tax is contested under section 2174, which, among other things, provides as follows:

"And every seaman being a foreigner shall, after his declaration of intention to become a citizen of the United States,

Alien Officers on Vessels—Statutory Construction.

and after he shall have served such three years, be deemed a citizen of the United States for the purpose of manning and serving on board any merchant vessel of the United States, anything to the contrary in any any act of Congress notwithstanding; but such seaman shall, for all purposes of protection as an American citizen, be deemed such after the filing of his declaration of intention to become such citizen."

In considering the case I shall assume, without deciding, that if section 2174 gave to Sjo the right to be an officer upon an American merchant vessel that vessel would be freed from the tax above mentioned; but the words "manning and serving on board any merchant vessel" do not necessarily give the right to act as an officer. To the contrary, we have the following express provision of section 4131:

"And officers of vessels of the United States shall *in all cases* be citizens of the United States."

This provision has been construed in an opinion of Attorney-General Brewster (17 Opin., 534); and it is held not to be qualified by section 2174. That opinion was rendered before 1883, and has, if I understand correctly, been the basis of a uniform departmental practice since that time. If there be any ambiguity in the statute such a practice should at this late date be regarded as having settled the law. (*United States v. Moore*, 95 U. S., 763; *United States v. Pugh*, 99 U. S., 265; *United States v. Healey*, 160 U. S., 136, 145; 20 Opin., 730.) Were the question a new one I should have great difficulty in reaching the same conclusion, because I can find no other provision in the Revised Statutes upon which the first clause quoted from section 2174 can operate. I do not feel justified, however, in overruling it after thirteen years' acquiescence in a case arising within a month before Congress, in amending the act for the purpose of abolishing some exceptions that had been granted (act of April 17, 1874, ch. 107), has expressed the rule even more emphatically than before. (Act of May 28, 1896, ch. 255, sec. 1.)

I am therefore of the opinion that the tax should not be remitted.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

Appropriation—Contracts.

APPROPRIATION—CONTRACTS.

Where an appropriation is made by act of Congress for certain improvements and authority is given to the Secretary of War to make additional contracts not to exceed a given amount to carry on continuously the work intended, and by a proviso to the act certain portions of the sum appropriated and authorized to be expended are to be expended in a particular way, the latter sums are to be charged to the specific sum appropriated.

If the appropriation should not be expended the work could at a subsequent time be contracted for under the authority to make additional contracts.

If the appropriations are not used for the particular work designated by Congress they can not be used for any other purpose.

The direction to expend the sums mentioned in the proviso is not mandatory to the extent that the full amount must be expended if the work can be done for less, or the work need not be proceeded with at all if contrary to the recommendations of the Mississippi River Commission mentioned in the act, it being manifest that the recommendations of the Commission were to be looked to.

DEPARTMENT OF JUSTICE,

September 29, 1896.

SIR: I have the honor to acknowledge the receipt of your letter of September 18, 1896, in which you set out from the river and harbor act of June 3, 1896 (29 Stat., 230), the following proviso:

“Provided further, That of the sum hereby appropriated and authorized to be expended the sum of sixty-four thousand dollars shall be expended in the rectification of the banks at Greenville, Mississippi, and sixty-four thousand dollars in the rectification of the banks at Helena, Arkansas, according to late plans submitted by Captain Graham D. Fitch, Corps of Engineers, and sixteen thousand dollars in the rectification of the banks at New Madrid, Missouri.”

You state that the Mississippi River Commission propose to limit operations at Greenville to an expenditure of \$24,000 and to defer all operations at New Madrid and Helena until funds authorized for expenditure in some later fiscal year are made available by future appropriation.

You ask my official opinion on the following points:

“1. Whether, in view of the phraseology of the proviso quoted, the several sums mentioned therein are chargeable only to the specific appropriation of \$625,000 made by the

Appropriation—Contracts.

act, or whether they are chargeable either to this appropriation or to any of the further sums pledged by Congress and which may be subsequently appropriated.

“2. Whether the expenditure of the several sums mentioned in the proviso, if chargeable only to said appropriation of \$625,000, is mandatory; and, if so, whether the same must be expended within this fiscal year.”

In my opinion the particular sums specified in the proviso are chargeable to the specific appropriation of \$625,000. It is just as if \$481,000 had been appropriated in one sum for all of the other purposes contemplated and the several sums mentioned in the proviso had been separately appropriated for the several specific purposes mentioned.

While this is true, I am further of the opinion that if for any reason the appropriations made by this act should not be expended the work could at a subsequent time be contracted for under the first proviso, which is as follows:

“That on and after the passage of this act additional contracts may be entered into by the Secretary of War for such materials and work as may be necessary to carry on continuously the plans of the Mississippi River Commission, as aforesaid, or said materials may be purchased and work done otherwise than by contract, to be paid for as appropriations may from time to time be made by law, not exceeding in the aggregate eight million three hundred and seventy-five thousand dollars, exclusive of the amount herein appropriated.”

I am further of the opinion that these specific appropriations, if not used for the particular work designated by Congress, can not be used for any other purpose.

The direction to expend the sums mentioned in the proviso is, in my opinion, not mandatory to the extent that you are bound to expend the full amount if the work can be done for less or to proceed with it at all contrary to the recommendation of the Mississippi River Commission.

The section to which this proviso is added is as follows:

“Continuing improvement, six hundred and twenty-five thousand dollars, which sum shall be expended under the direction of the Secretary of War, in accordance with the plans, specifications, and recommendations of the Mississippi River Commission.”

Importation of Chromos—Statutory Construction.

It is manifest that the recommendations of the commission were to be looked to.

The whole question of plans for improving the Mississippi River has been largely intrusted to them.

If, looking as they doubtless would to the enterprise as a whole, or, if conditions having altered, they should recommend that special work should not be proceeded with, I do not think that you are compelled to do so even when an appropriation has been made in the emphatic language in the proviso, for it is not necessarily in conflict with that portion of the act above quoted, and should be construed in harmony with it, if possible, looking to the purpose of Congress so long manifested to have the work executed according to the plans and recommendations of the commission.

Respectfully,

JUDSON HARMON.

The SECRETARY OF WAR.

IMPORTATION OF CHROMOS—STATUTORY CONSTRUCTION.

The importation of foreign-made chromos, which are copies of a foreign painting that has been copyrighted, but which are not themselves copyrighted, but are protected only by the copyright of the original painting, is not prohibited by an act of Congress providing the manner of obtaining a copyright for chromos, and forbidding, during the existence of such copyright, the importation into the United States of any chromos so copyrighted.

Where the language of an act of Congress is ambiguous, the probable intention of the individual Members of Congress would be sought as a guide to construction, but a clear omission from the statute can not be supplied upon any consideration of supposed oversight, inconsistency, or hardship.

DEPARTMENT OF JUSTICE,

October 3, 1896.

SIR: Certain foreign-made chromos, which are copies of a foreign painting, are being imported. The painting has been copyrighted under sections 4952 and 4956 of the Revised Statutes, as amended by the act of March 3, 1891, chapter 565. You do not inform me whether or not the importation is a violation of the copyright; nor is this material to the question which has arisen in your Department.

Importation of Chromos—Statutory Construction.

These chromos are not made from drawings on stone made within the limits of the United States; and in your communication of September 15 you ask to be advised whether their importation is prohibited by the proviso to section 4956.

Under the enactments above referred to, by observing the proper formalities, not only may a painting be copyrighted but also a book, photograph, chromo, or lithograph. It is not, however, profitable to copyright a chromo or other lithograph representing a copyrighted painting; for the copyright of the painting protects all copies made by its owner or persons authorized by him, while copies made by anybody else, whether by lithography or otherwise, are illegal. Hence, chromos may be imported which are not themselves copyrighted, but are protected only by the copyright of the original painting; and I understand from you that these chromos are of such description.

To obtain a copyright for a painting under section 4956, a photograph thereof must be delivered to the Librarian of Congress, or else deposited in the mail within the United States addressed to him. To obtain a copyright for the chromo or lithograph, two copies thereof must be so delivered or deposited; provided—and this is the proviso to which you refer—that “the two copies of the same required to be delivered or deposited as above shall be printed from * * * drawings on stone made within the limits of the United States or from transfers made therefrom.” The proviso relates also to books and photographs, but not to paintings. It continues as follows:

“During the existence of such copyright the importation into the United States of any book, *chromo*, lithograph, or photograph *so copyrighted*, or any edition or editions thereof, or any plates of the same not made from type set, negatives, or drawings on stone made within the limits of the United States, shall be, and it is hereby, prohibited.”

This proviso clearly applies only to books, chromos, lithographs, or photographs, copyrighted as thereinbefore directed, namely, by delivering or depositing two copies with the Librarian of Congress. It can not, without violation of its language, be so read as to include in its application chromos or photographs protected merely by the copyright of the painting.

Remission of Penal Duties.

It is urged that the individual Members of the Congress which enacted the proviso intended to include all chromos protected by copyright, whether the copyright was granted for the chromo itself, or for the painting of which it is a copy. Had they so intended, it would have been easy to say so. Had their language been ambiguous, their probable intent would have been sought for as a guide to construction. But their language is unambiguous; and to torture the clear language of Congress, in order to fulfill a supposed intent of its individual members, would be to legislate, not to construe the law. "A clear omission from a statute, like this, can not be supplied upon any considerations of supposed oversight, inconsistency, or hardship." (21 Opin., 292.)

I have therefore the honor to advise you that the importation of the chromos is not prohibited.

Very respectfully,

EDWARD B. WHITNEY,
Acting Attorney-General.

THE SECRETARY OF THE TREASURY.

REMISSION OF PENAL DUTIES.

As the Secretary of the Treasury has no authority to refund "additional" or penal duties imposed by the customs administrative act of 1890, when once in the Treasury, merely because not incurred by willful negligence or fraud, and as the collectors of customs are obliged under the law to require payment of so-called penal duties as a condition precedent to delivery of the goods and must pay them at once into the Treasury when received, without waiting for the result of an application for remission, the power of the Secretary of the Treasury to remit such duties may be unavailing in many cases, but not in the case of warehoused goods, nor where the penalties are first assessed upon final liquidation after the delivery of the goods to the importer. When goods are entered or withdrawn for consumption, the Treasury Department has no authority to suspend the collection of these penal duties pending an application for remission, "the goods in the meanwhile having been delivered from the custody of the Government."

DEPARTMENT OF JUSTICE,

October 3, 1896.

SIR: It has been held that the "additional" or penal duties imposed under section 7 of the customs administrative act of

Remission of Penal Duties.

June 10, 1890, chapter 407, may be remitted by you (20 Opin., 660); but that you have no authority to refund them, when once in the Treasury, merely because not incurred by willful negligence or fraud (21 Opin., 320), and that the collectors of customs must pay them at once into the Treasury when received, without waiting for the result of an application for remission (21 Opin., 345). Of course, like other duties, they can be refunded in certain cases. (21 Opin., 224, 251.)

In your communication of September 14 you ask whether your Department has authority to suspend the collection of these penal duties pending such application, "the goods in the meanwhile having been delivered from the custody of the Government." You suggest "that if collectors are obliged under the law to require payment of so-called penal duties as a condition precedent to delivery of the goods the power of the Secretary of the Treasury to remit such penalties is in effect abrogated." The power may be unavailing in many cases, but not in the case of warehoused goods, nor where the penalties are first assessed upon final liquidation, after the delivery of the goods to the importer, as in *Patton v. United States* (159 U. S., 500).

Prior to the Revised Statutes the estimated duties upon imported goods had to be paid at once, or a warehouse bond given. (*Barney v. Rickard*, 157 U. S., 352, 357-359, and authorities cited.) I am aware of no subsequent legislation relaxing these requirements. The warehouse bond is the security referred to in section 2869 of the Revised Statutes, as amended by the act of June 5, 1894, chapter 92. If the goods are warehoused, and subsequently withdrawn for consumption before a decision upon the application for remission, the penal duties must be paid. (Customs administrative act, sec. 20.)

I therefore have the honor to advise you that when goods are entered or withdrawn for consumption all duties then charged against them, including penal duties, must be paid before they are released from Government custody.

Very respectfully,

EDWARD B. WHITNEY,
Acting Attorney-General.

THE SECRETARY OF THE TREASURY.

Statutory Construction.

STATUTORY CONSTRUCTION.

While the word "may" in a statute is sometimes construed as imposing a duty rather than conferring a discretion, yet this rule of construction is by no means invariable, and its application depends on the context of the statute, and whether it is fairly to be presumed that it was the intention of the legislature to confer a discretionary power or to impose an imperative duty.

The ordinary meaning of the language in the enactment must be presumed to be intended unless it would manifestly defeat the object of its provisions.

The Secretary of War is not required by the river and harbor act of June 3, 1896, providing that contracts *may* be entered into by him for the completion of improvements named, to make such contracts, but he has a discretion to decline to make them in all cases where he is convinced that the public interest would not be subserved by making them.

DEPARTMENT OF JUSTICE,

October 9, 1896.

SIR: I have the honor to acknowledge your letter of October 7, wherein, calling my attention to various provisos in the river and harbor act of June 3, 1896, that contracts *may* be entered into by you for the completion of improvements named, to be paid for out of future appropriations, you inquire:

"Is it mandatory that the Secretary of War *shall* make such contracts, estimate for and enter upon the improvement of such rivers and harbors as are provided for in this act, or is it within his discretion to decline to make such contracts in any case where he is convinced that the proposed expenditure will not be for the public interest?"

I have given the subject the serious consideration which its importance requires, and beg to submit my opinion as follows:

The enacting clause of the act named is:

"That the following sums of money be, and are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, to be immediately available, and to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers, for the construction, completion, repair, and preservation of the public works hereinafter named."

Statutory Construction.

Then follow the recital of various improvements, with the sums appropriated for each, to many of which are appended the provisos to which your question relates. These appear to be in the same form throughout, and the first will therefore serve as a sample. It is:

"Improving harbor at Rockland, Maine: Continuing improvement, including project recommended by Chief of Engineers under date of December fourteenth, eighteen hundred and ninety-five, twenty-five thousand five hundred dollars, of which one thousand five hundred dollars may be expended for the removal of an old hulk, sunk in the harbor: *Provided*, That contracts may be entered into by the Secretary of War for such materials and work as may be necessary for the completion of said projects for the improvement of said harbor, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate seven hundred and sixty thousand five hundred dollars, exclusive of the amount herein and heretofore appropriated."

The appropriation of specific funds "to be immediately available" ordinarily imposes the duty of expending them for the purposes named in the act. In the item quoted there is nothing indicating an intention to leave anything to your discretion with respect to the expenditure of the sum appropriated.

But the authority given you to contract for work to be paid from future appropriations is not only in the form of a proviso, but is also expressed in the form usually adopted for the granting of authority with discretion. It could be held that you are required to enter into such contracts only by construing the word "may" as imposing a duty rather than conferring a discretion. While such construction is sometimes given this word, especially where the power conferred is to be exercised for the benefit of the public or that of private persons, yet "this rule of construction is, however, by no means invariable. Its application depends on the context of the statute, and on whether it is fairly to be presumed that it was the intention of the legislature to confer a discretionary power or to impose an imperative duty." (*U. S. v. Thoman*, 156 U. S., 359.)

Statutory Construction.

From the various authorities cited in the opinion in that case (see also 63 Md., 18; 121 N. Y., 569) it appears that the true rule always is that stated by Mr. Justice Story in *Minor v. Mechanics' Bank* (1 Pet., 64), that "that exposition ought to be adopted in this, as in other cases, which carries into effect the true intent and object of the legislature in the enactment. The ordinary meaning of the language must be presumed to be intended unless it would manifestly defeat the object of the provisions," and by Mr. Justice Grier in *Thompson v. Carroll's Lessee* (22 Howard, 434), that "it is only where it is necessary to give effect to the clear policy and intention of the legislature that such a liberty can be taken with the plain words of the statute." The intention of Congress was, except in instances where a contrary intent is manifested (see 21 Opin., 391, with reference to the same act now in question), that you should proceed with the projects specified to the extent of the appropriations without inquiry as to their wisdom. This, which is the main purpose of the act, would not be affected by construing the provisos according to the ordinary meaning of their language, which is permissive and not mandatory. There is no necessity, therefore, of resorting to a rule of construction to make the language of the act conform to the intention of Congress. On the contrary, it is entirely reasonable, from the nature of the subject and the usual mode of dealing with it by Congress, to assume that the provisional and permissive forms were purposely used in order to leave to your sound discretion the determination whether it would be better for the public interests to make contracts covering the entire work, or, by confining the expenditures to the sums appropriated, leave Congress free to act upon new information, changes in the situation, or different views of public necessity or policy which experience may induce.

My answer to your question, therefore, is that you are not required to make such contracts, but have a discretion to decline to make them in all cases where you are convinced that the public interest would not be subserved by making them.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF WAR.

Public Printer's Appropriation.

PUBLIC PRINTER'S APPROPRIATION.

The allotment of the Public Printer's appropriation among the different Departments is not within the jurisdiction of the accounting officers of the Treasury.

Copies of Congressional documents ordered from the Public Printer under section 90 of the public printing and binding act of January 12, 1895, by the Secretary of State to a number not exceeding the number of bureaus in his Department, should not be charged to the allotment of the Public Printer's appropriation for such Department.

DEPARTMENT OF JUSTICE,

October 12, 1896.

SIR: I have the honor to acknowledge your communication of October 8, referring to my opinion of August 31 (21 Opin., 405) with relation to questions in controversy between your Department and the Public Printer. For an answer to one of these questions, which related to the construction of an appropriation act, I referred you to the Comptroller of the Treasury for an answer. I have since been furnished by the Comptroller with a copy of the opinion which he rendered you on July 15, 1896 (3 Comp. Dec., 19), showing that the allotment of the Public Printer's appropriation among the different Departments is not actually passed upon by the accounting officers of the Treasury, and holding that it is not within the jurisdiction of these officers. (See Rev. Stat., 3802; sundry civil appropriation act of June 11, 1896, ch. 420, 29 Stat., 452.) I am informed that this ruling of the Comptroller is in accordance with a uniform and well-established practice in the accounting offices under similar appropriation acts, which is enough to settle its correctness (20 Opin., 721; 21 Opin., 338, 349); and it appears to be well grounded. Consequently, the Comptroller's opinion can not be asked under the Dockery Act of July 31, 1894, chapter 174, section 8, and it becomes necessary for me to answer your question.

The question arises under the public printing and binding act of January 12, 1895, chapter 23, section 90, which section is set forth at 21 Opin., 371. You have ordered from the Public Printer eleven copies of certain Congressional documents of interest to your Department, that number not exceeding the number of bureaus therein. The Public Printer

Chinese—Treaty.

insists upon charging them to the allotment for your Department. He has informed me that he does not desire to submit an argument upon the question. I am unable to perceive any reason for his ruling. It is my opinion that the eleven copies you desire should be furnished you without such charge.

Very respectfully, JUDSON HARMON.
The SECRETARY OF STATE.

CHINESE—TREATY.

The Treasury Department has no authority to direct the admission of Chinese laborers who fail to obtain before departure from this country the certificate required by the treaty with China, although they have complied with all the requirements affecting Chinese who leave the United States, except the procuring of this certificate.

A Chinese laborer who proposes to leave the United States and return, complies with the conditions necessary to demand a certificate if he file the required papers "with the collector of customs of the district from which he departs." Any rule directing him to file such papers with the collector of any other district imposes a condition not warranted by the treaty.

DEPARTMENT OF JUSTICE,

October 14, 1896.

SIR: I have the honor to acknowledge the receipt of your letter of October 10, 1896, in which you ask whether or not your Department can direct the admission of returning Chinese laborers who failed to obtain, before departure from this country, the certificate prescribed by Article II of the treaty between the United States and China of March 17, 1894, it appearing that such persons, before leaving this country, complied with all of the requirements affecting Chinese laborers who leave the United States with the purpose of returning, except that of procuring from the collector of customs of the district from which they departed certificates of their right to return.

The only provision for the return of Chinese laborers to the United States is under said article, which is as follows:

"The preceding article shall not apply to the return to the United States of any registered Chinese laborer who has a lawful wife, child, or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. Neverthe-

Chinese-Treaty.

less every such Chinese laborer shall, before leaving the United States, deposit, as a condition of his return, with the collector of customs of the district from which he departs, a full description in writing of his family, or property, or debts as aforesaid, and shall be furnished by said collector with such certificate of his right to return under this treaty as the laws of the United States may now or hereafter prescribe and not inconsistent with the provisions of this treaty; and should the written description aforesaid be proved to be false the right of return thereunder, or of continued residence after return, shall in each case be forfeited. And such right of return to the United States shall be exercised within one year from the date of leaving the United States; but such right of return to the United States may be extended for an additional period, not to exceed one year, in cases where by reason of sickness or other cause of disability beyond his control such Chinese laborer shall be rendered unable sooner to return, which facts shall be fully reported to the Chinese consul at the port of departure, and by him certified, to the satisfaction of the collector of the port at which such Chinese subject shall land in the United States. And no such Chinese laborer shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required."

It has for a long time been the policy of Congress to exclude Chinese laborers from the United States.

Section 4 of the act approved July 5, 1884 (23 Stat., 115), provided for the return of Chinese laborers under certain stringent conditions.

By section 2 of the act approved October 1, 1888, the right of return given to Chinese laborers was entirely taken away.

The policy of the Government being against the admission of Chinese laborers, treaty provisions making exceptions should not be extended by construction to cases not falling within the plain scope of the language used.

I am of the opinion that the words "before leaving the United States" qualify the words "shall be furnished by said collector with such certificate of his right to return," and that it was the intent that each Chinaman should, before leaving, receive such certificate in order to entitle him to return.

Chinese-Treaty.

If it be held that departing Chinese laborers can do what is affirmatively imposed upon them, and leave the country with the right to have certificates forwarded, it is manifest that great confusion may arise, the certificates may not get to proper hands, and the burden of enforcing the exclusion acts may be thereby rendered much more onerous.

The rule promulgated by your Department, and which was in force when the case now present arose, provides that the collector of customs, "if he is satisfied that the person presenting the same is the Chinese laborer therein described, he shall issue to him, on his departure from said port, a certificate in the following form." (Synopsis, Rulings and Decisions, 1896, p. 31.)

This rule, which is consistent with the provisions of the treaty, would, in effect, be destroyed if personal delivery be dispensed with.

I answer the question in the negative.

You also call attention to a regulation of your Department which requires that Chinese laborers who propose to leave the United States and return shall file application, statement, etc., with the collector for the district within which the laborer resides, which collector is to certify the papers and forward the same to the collector of customs at the port of exit; and you ask whether or not such papers may be filed properly in the office of the collector of customs at the port where the Chinese laborer resides, in view of the requirement of Article II of the treaty, that such papers shall be placed by the laborer in the possession of the collector of customs for the district from which he is to depart.

I understand your question to be, in substance, whether or not your Department can require such papers to be filed by the laborer with the collector for the district within which he resides.

I am of the opinion that the departing laborer complies with the conditions necessary to demand a certificate if he file the required papers "with the collector of customs of the district from which he departs," and that any rule directing him to file such papers with the collector of any other district imposes a condition not warranted by the treaty.

Respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

Public Printing—Statutory Construction.

LEAVES OF ABSENCE.

The provisions of the legislative appropriation act of March 3, 1893, concerning annual and sick leaves of absence do not apply to employees of the Department of Agriculture employed outside of the city of Washington. (21 Opin., 338 followed.)

DEPARTMENT OF JUSTICE,

October 17, 1896.

SIR: I have the honor to acknowledge your communication of October 14, asking my opinion whether the provisions concerning annual leave and sick leave in the legislative appropriation act of March 3, 1893, chapter 211, section 5, apply to employees of your Department employed outside of this city. This question has already been settled in the negative (21 Opin., 338), and I so advise you.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF AGRICULTURE.

PUBLIC PRINTING.

The word "order" in section 80 of the public printing and binding act of January 12, 1895, providing that "no order for public printing shall be acted upon by the Public Printer after the expiration of one year unless the entire copy and illustrations for the work shall have been furnished within that period," was not intended to include a joint resolution of Congress like the resolution of April 2, 1894, providing for printing "a history of the international arbitrations to which the United States was a party, together with a digest of the decisions rendered in such arbitrations."

DEPARTMENT OF JUSTICE,

October 19, 1896.

SIR: I have the honor to acknowledge your communication of October 16, asking an opinion upon a question of law raised by Mr. John B. Moore.

It appears that Congress, by a joint resolution approved April 2, 1894, provided for printing "a history of the international arbitrations to which the United States was a party, together with a digest of the decisions rendered in such arbitrations," * * * "said history and digest to be printed under the editorial supervision of John Bassett Moore, and the editing to be paid for out of any moneys in the Treasury

Extradition Proceedings—Translation of Papers.

not otherwise appropriated.” You do not state the facts further, but I assume that the history had not been prepared at the time of the passage of the resolution, so that the intention was for Mr. Moore to write the history and digest, and not simply to supervise their printing. The work was one which would naturally be expected to involve a considerable expenditure of time.

By the public printing and binding act of January 12, 1895, chapter 23, section 80, it was provided that “no order for public printing shall be acted upon by the Public Printer after the expiration of one year unless the entire copy and illustrations for the work shall have been furnished within that period,” with a proviso which does not seem to me to be applicable here.

I think that the word “order” in the clause just quoted was not intended to include a joint resolution of Congress like that now under consideration. It is, therefore, my opinion that this provision is no bar to the completion of Mr. Moore’s work.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF STATE.

EXTRADITION PROCEEDINGS—TRANSLATION OF PAPERS.

In an application by the Mexican Government to a United States commissioner for the extradition of a fugitive under the treaty with that country, the commissioner should decline to proceed with the inquiry until a translation of the papers containing the charges are produced before him, but in such a case he should so advise that Government and make a liberal allowance of time for the production of such translation before returning the papers.

While the treaty does not in terms provide for such translations, yet the proceedings thereunder must accord with the rules and forms of the tribunals of that jurisdiction to which recourse is had; and inasmuch as the Commissioner is the sole judge of the weight and sufficiency of the evidence upon which extradition is sought, it follows that such evidence must be presented in a language that is intelligible to him.

DEPARTMENT OF JUSTICE,

October 24, 1896.

SIR: I have the honor to acknowledge the receipt of your communication of the 20th instant, inclosing the translation

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of a note to you from the Mexican minister, stating that the United States commissioner at El Paso, Tex., from whom the Governor of the State of Chihuahua asked the extradition of Demetrio Cortes and his accomplices, returned the papers in the case on account of their not being translated. You ask my opinion as to "whether the commissioner should formally reject and return the papers to the country seeking extradition because they, or some part of them, have not been translated."

By article 1 of the treaty with Mexico of December 11, 1861, it is provided:

"That this (the delivery of a person charged with crime) shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed."

The act of Congress conferring jurisdiction upon the commissioner or other examining officer says that if he deems the evidence sufficient to sustain the charge under the provisions of the treaty he shall certify the same, together with a copy of all the testimony, and issue his warrant for the commitment of the person so charged.

The Supreme Court of the United States in the case of *In re Luis Oteiza y Cortes* (136 U. S., 337), quotes with approval the language of Judge Wallace in 21 Blatch., 300. When referring to United States commissioners sitting in cases of extradition, he said:

"He is made the judge of the weight and effect of the evidence, and this court can not review his action, when there was sufficient competent evidence before him to authorize him to decide the merits of the case."

In order to the intelligent exercise of his judgment, the mind of the commissioner must be informed as to the facts of the case before him. He can be judicially informed only by the evidence which may be laid before him, in language and terms which are intelligible to him. If the evidence adduced is couched in signs, symbols, or language which the commissioner does not understand, it must be translated into terms which are intelligible.

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It is objected on behalf of the Mexican Government that the treaty under which this extradition was asked makes no provision for the translation by that Government of such writings. But it should be remembered that while the treaty does secure to the parties to it the mutual right of extradition, yet the proceedings for the exercise of such right must of necessity accord with the rules prescribed and the forms observed in the tribunals of that jurisdiction to which recourse may be had. In Mexico the proceedings would be governed by the laws and forms which are in force there, and so, when the application is made to the judicial tribunals of this country, a like rule should be applied.

In every jurisdiction the person invoking its aid must present his case in accordance with its rules. He is the *actor*, the plaintiff, the petitioner, and must present his case both in its *allegata* and *probata* fully and intelligibly. If the testimony of an expert is needed to furnish the translation of the documents offered in evidence, the party offering the evidence must produce with it the translation.

I am of opinion that the commissioner should have declined to proceed with the inquiry upon which he was engaged until the proper translations were produced before him, but he should have so advised the Mexican Government and made a liberal allowance of time to enable that Government to produce such translations before returning the papers.

Very respectfully,

HOLMES CONRAD,
Acting Attorney-General.

The SECRETARY OF STATE.

NAVIGABLE WATERS—DELEGATION OF LEGISLATIVE
FUNCTIONS.

Under the provisions of an act providing that whenever the Secretary of War determines that a bridge over a navigable waterway of the United States is an unreasonable obstruction to the free navigation of such waterway, it shall be his duty, after giving the parties an opportunity to be heard, to direct that the bridge be so altered as to render navigation reasonably unobstructed, and in giving such notice he shall specify the changes required and the time within which to be made.

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It is not an unconstitutional delegation of the legislative function for Congress to intrust to the Secretary of War the power to declare what is an unreasonable obstruction to navigation.

Congress itself is not required to consider each case of alleged obstruction to navigation and determine the facts and declare that an obstruction exists, but it may generally define the offense and leave the facts to be determined by a court or special tribunal.

Where a bridge was erected by authority of a State before Congress assumed actual jurisdiction over the river for the purposes of navigation, and it is declared to be an obstruction to navigation, such obstruction may be removed without compensation from the United States, and such removal can not be regarded as a "taking of private property," within the meaning of the Constitution.

The power of Congress over navigable streams is supreme and grows out of the power to regulate commerce.

The power of Congress to declare what is an obstruction and to remove it from a navigable stream is well settled.

DEPARTMENT OF JUSTICE,

October 24, 1896.

SIR: On January 28, 1896, the Department of Justice received your letter of January 27, 1896, in which you state the following:

"About 3 miles above the mouth of Rock River, Illinois, commence the Lower Rapids, at Milan, Ill., which extend upstream about $1\frac{1}{2}$ miles. Prior to the improvements hereinafter mentioned the depth of water at the head of these rapids was 2 feet at low water, but at high water in the Mississippi River the rapids were entirely backed out, giving a navigable depth of 11 feet. From 1836 to 1850 a very considerable commerce was carried on this river by means of steamboats, flatboats, and barges, but with the construction of the Sterling dam in 1854, about 50 miles above the mouth of the river, and of low fixed bridges at Colona and Milan, near its mouth, all navigation of the river ceased.

"In 1888 it was determined to use the lower portion of this river as a part of the Illinois and Mississippi Canal route, and since then the Government has built dams at the head of these rapids and a canal around the rapids. A wagon bridge, owned and controlled by the city of Moline, Ill., spans the river, about 4 miles above this canal, over the pool created by these dams. It is a fixed bridge with bottom chord only about 3 feet above high water and 11 feet above the fixed level of the pool; and it is necessary that

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the bridge should be altered to meet the requirements of navigation and also to allow the construction of that portion of the canal route which involves the use of Rock River.

"This bridge was constructed by the Moline and Rock River Plank and Macadamized Road and Bridge Company under authority of an act of the Illinois legislature approved February 14, 1855, which provided that said company or its assigns should not be required to maintain a draw in its bridge unless the legislature should thereafter require sufficient draws in certain other bridges across this river. In 1876 the city of Moline, Ill., purchased the bridge from this company.

* * * * *

"It seems clear from the facts stated that Rock River has always been, in its natural state, navigable in fact at high water for a considerable distance above the location of this bridge, although its navigation has been obstructed since about 1850 by low fixed bridges."

You requested an opinion "as to whether the city of Moline, Ill., can be compelled to alter this bridge at its own expense, under the provisions of said act of Congress (river and harbor act, approved September 19, 1890), so that it will not be an unreasonable obstruction to navigation of the Illinois and Mississippi Canal route."

There was then pending in the Supreme Court of the United States the case of *United States v. Rider et als.*, the merits of which involved a question of law which was considered decisive of the point presented by your letter, and the Attorney-General asked that action be deferred in this matter until the decision of the Supreme Court, to which request you acceded.

The Rider Case, which is reported in 163 U. S., 132, went off on a question of jurisdiction, and the merits were not passed upon.

In a letter dated October 14, 1896, referring to former correspondence, you renew your request for an opinion.

The question of whether or not Rock River is within the term "navigable waters of the United States" is one of mixed fact and law.

The facts stated in your letter, and the fact that Rock River leads into the Mississippi River, bring it within the

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term. (*The Daniel Ball*, 10 Wall., 557; *The Montello*, 20 Wall., 430; *Escanaba Co. v. Chicago*, 107 U. S., 682.)

The question of law arises as to whether or not the parties controlling the bridge can be compelled to alter it *without the Government bearing the expense*. This question is one of very great gravity, and is not free from doubt.

Section 4 of the act of September 19, 1890 (26 Stat., 453), is as follows:

“That section nine of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

“That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters, on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken.”

Section 5 is as follows:

“That section ten of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

“That if the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect as hereinbefore required from the Secretary of War, and within the time prescribed by him,

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willfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars; and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed.' ”

The United States, as appears by your statement, has assumed jurisdiction over Rock River.

The power of Congress over navigable streams is supreme, and grows out of the power to regulate commerce. (*Monongahela Navigation Co. v. United States*, 148 U. S., 335; *Bridge Co. v. United States*, 105 U. S., 475.)

When Congress chooses to act, it is not concluded by anything that the States or that individuals by its authority have done from assuming entire control of the matter and abating any erections that may have been made, and preventing any others from being made except in conformity with such regulations as it may impose. (*Gilman v. Philadelphia*, 3 Wall., 713; *Bridge Co. v. United States*, 105 U. S., 479; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S., 1, 12; *Escanaba Co. v. Chicago*, 107 U. S., 683; *Monongahela Navigation Co. v. United States*, 148 U. S., 336.)

The power of Congress to declare what is an obstruction and to remove it from a navigable stream is well settled. (*Gilman v. Philadelphia*, 3 Wall., 731; *Bridge Co. v. United States*, 105 U. S., 475; *Escanaba Co. v. Chicago*, 107 U. S., 683; *Miller v. Mayor of New York*, 109 U. S., 385; *Monongahela Navigation Co. v. United States*, 148 U. S., 335.)

The question arises whether or not the power intrusted to the Secretary of War by sections 4 and 5 of the river and harbor act of September 19, 1890, is a delegation of the legislative function.

In *United States v. Keokuk and H. Bridge Co.* (45 Fed. Rep., 178) Judge Shiras held that—

“A bridge having been built and maintained in accordance with the requirements of an act of Congress, the Secretary

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of War can not declare it an obstruction to navigation and require it to be changed, remodeled, or rebuilt under the act of Congress of August 11, 1888 (25 U. S. Stat. L., p. 424, secs. 9, 10), providing that when he shall have reason to believe that any bridge is an obstruction to free navigation, or where there is difficulty in passing the draw opening or raft span, the Secretary of War shall give notice requiring the bridge to be altered so as to render navigation through or under it free, easy, and unobstructed, and that the owner of any such bridge shall be liable to a penalty for willfully failing to remove the bridge or to cause the necessary alterations to be made."

The ground proceeded upon was that—

"The section in question confers upon the Secretary the duty of determining whether a given bridge is an unreasonable obstruction, which in turn involves the duty of determining how much of an obstruction the public interests require should be placed in the way of the free navigation of the river, which is a question which belongs to Congress to determine and which can not be rightfully delegated to any subordinate authority or person" (p. 183).

Sections 9 and 10 of the act of 1888 were amended by sections 4 and 5 of the act of 1890.

Among other material changes made by the amendments, it is provided that the obstruction must be "*unreasonable*," and that the parties shall have a "*reasonable opportunity to be heard*," and that the Secretary of War shall "*specify the change required to be made*."

Section 5 expressly makes a failure to comply with the requirements of section 4 a misdemeanor.

In the Rider Case, United States District Judge Sage followed Judge Shiras, extending the doctrine as laid down by him to the sections as amended, saying "the question to be here decided is whether Congress could delegate, as it has undertaken to do, its authority in the premises to the Secretary of War. My conclusion is that it could not." (*United States v. Rider*, 50 Fed. Rep., 410.)

Congress has passed a complete act, providing that it shall be a misdemeanor to maintain an unreasonable obstruction

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to navigation after a notice and hearing and after the special tribunal charged with the investigation of and finding of the fact has determined that there is an unreasonable obstruction and a reasonable time for removing the obstruction has expired.

The party concerned has a hearing, and the offense is not complete until after the hearing and a determination against him, and an opportunity to abate the nuisance has been given.

The whole inquiry seems to resolve itself into whether or not Congress must itself consider each case of alleged obstruction to navigation and determine the facts, and declare that an obstruction exists, or whether it can generally define the offense and leave the facts to be determined by a court or special tribunal.

Because Congress is vested with the power, as incidental to the commerce clause, to protect navigation, and, therefore, can declare and remove an obstruction, it does not follow that it must itself examine into the details and facts of each case. This would be impracticable and would almost nullify the use of the power.

Between sessions obstructions to navigation, no matter how outrageous, could not be dealt with. If Congress should undertake, during the sessions, to investigate specific cases, it is manifest that it would simply amount to a practical abdication of the power; for in the nature of things it would be impossible, within any reasonable time, to determine such questions.

It would be equally out of the question for Congress to attempt to define "unreasonable obstruction to navigation," so as to make the definition practically safe and useful. It might as well be attempted to define "fraud" by a statute and fix its limitations and characteristics.

If the power is to be exercised at all, it must be under a general law declaring, as the law in question does, that the maintenance of an unreasonable obstruction shall be a misdemeanor, and the determination of the facts must be left to some tribunal, either a regular court, or a commission, or an executive officer. The determination of such a question in the regular course of judicial proceedings would be tedious.

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expensive, and the results would be variable, inasmuch as separate juries could come to different conclusions upon practically the same state of facts. In the interest of economy, promptness, and uniformity of decisions, it is manifest that the best course to be adopted is the one that has been pursued.

If the act, in general terms, made the maintenance of an obstruction a misdemeanor, and if there could then be a conviction upon the determination of the Secretary of War, or any other tribunal, of the question as to whether or not there had been an unreasonable obstruction, it could be objected that persons would be committing a misdemeanor without knowing at the time that there was a violation of the law.

The act in question, however, is not open to this criticism. There is first a hearing and a determination of the facts, and then there is an opportunity to avoid committing the offense, and the offense is only complete after the party is fully apprised of all the conditions.

In this case the Secretary of War is made a special tribunal to adjudicate facts.

It is competent for the legislature to establish, independent of the courts, special tribunals whose judgment shall be final.

The taxing interests of this country involve by far the largest question so far as value is concerned. The assessment of property is necessarily intrusted to special tribunals, which operate constantly and upon a vast scale. They are composed of nonjudicial officers, and if they pursue the law their conclusions are final.

In *Nishimura Ekiu v. United States* (142 U. S., 651) and *Fong You Ting v. United States* (149 U. S., 698) and *Lem Moon Sing v. United States* (158 U. S., 538), it was held that Congress might intrust to executive officers the final determination of facts upon which foreigners might be sent out of or excluded from this country, and that their conclusions could not be reexamined by any court.

Congress has repeatedly passed laws committing the execution of acts in regard to the admission of aliens into the United States to the Secretary of the Treasury, collectors of

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customs, and to inspectors acting under their authority. (See acts of Mar. 3, 1875, ch. 141, 18 Stat., 477; Aug. 3, 1882, ch. 376, 22 Stat., 214; Feb. 23, 1887, ch. 220, 24 Stat., 414; Oct. 19, 1888, ch. 1210, 25 Stat., 566.)

By section 3 (22 Stat., 214), and in similar laws, the Secretary of the Treasury was authorized to establish rules and regulations and to issue instructions to carry out these and other immigration laws of the United States.

In *Enterprise Saving Association v. Zumstein* (67 Fed. Rep., 1000), it was held by the circuit court of appeals of the sixth circuit, in an opinion delivered by Judge Lurton, and concurred in by Judges Taft and Severens, that in enforcing the postal laws against lotteries it was competent for Congress to intrust to the head of the Post-Office Department the determination of the question as to what was a lottery.

Congress can only legislate in a general way, and large powers are necessarily intrusted to the different departments, such, for instance, as the supervising power given to the Secretary of the Interior over questions of patents and relations to Indians and the public lands. It has been held that he can set aside a survey and order another survey and issue a patent thereon, which is the exercise of judicial power. This right arises from the supervising power given him under the statute, and the courts have invariably sustained it, and in speaking of this class of powers have said:

“It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and therefore that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.” (*Williams v. United States*, 138 U. S., 524; *Knight v. United States Land Assn.*, 142 U. S., 181.)

In *McCulloch v. Maryland* (4 Wheat., 316, 421), Chief Justice Marshall said:

“The sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into

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execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional."

It has now been established beyond controversy that Congress has the power to incorporate national banks and clothe them with large discretionary powers, and for the purpose of accomplishing what Congress itself might directly do.

This power was maintained in *McCulloch v. Maryland* (4 Wheat., 316) and in *Osborn v. United States Bank* (9 Wheat., 738) mainly upon the ground that it was an appropriate means for carrying on the money transactions of the Government. (*Legal Tender Case*, 110 U. S., 445.)

In re *The Laura* (114 U. S., 411), although the pardoning power is by the Constitution vested in the President, the court held that an act authorizing the Secretary of the Treasury to remit fines and penalties incurred by a steam vessel was valid, and it held that to determine otherwise would be to overthrow the practice which had been observed and acquiesced in for nearly a century.

In *Dorsheimer v. United States* (7 Wall., 166) it was held that such power intrusted to the Secretary of the Treasury is one for the exercise of his discretion in a matter intrusted to him alone, and that it admits of no appeal to any court.

In all those cases in which it is held that executive officers of the Government will not be controlled by the court in matters in which they have to exercise judgment or discretion, it is apparent that large powers are intrusted by Congress under the acts investing them with authority, and that they really exercise in this way by delegation, and necessarily so, for the purpose of carrying on the vast affairs of the Government and its details, authority which in a strict sense pertains to Congress. (See *Decatur v. Paulding*, 14 Pet., 497-514; *United States v. Guthrie*, 17 How., 284; *United States v. The Commissioners*, 5 Wall., 563; *Litchfield v. Register and Receiver*, 9 Wall., 575-577; *Carrick v. Lamar*, 116 U. S., 426.)

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In *United States v. Breen* (40 Fed. Rep., 402) it was held that Congress can authorize the Secretary of War to make rules and regulations, and can make it a misdemeanor to violate these rules when so made.

In *United States v. Bailey* (9 Pet., 238) it was held that the crime of perjury, which was defined by statute, could be committed by taking an oath in conformity with a mere regulation of the Treasury Department.

In *Caha v. United States* (152 U. S., 219), in commenting upon this decision, the court said:

"It was held that the Secretary had power to establish the regulation, and that the effect of it was to make the false affidavit before the justice of the peace perjury within the scope of the statute, and this notwithstanding the fact that such justice of the peace was not an officer of the United States."

In the Caha Case the court upheld an indictment for perjury, which grew out of proceedings instituted in accordance with regulations of the Interior Department.

These cases and the case under consideration differ from that of *United States v. Eaton* (144 U. S., 677), in which the court held that a failure to comply with regulations made by the Commissioner of Internal Revenue could not be punished. The reason was that the statute had not made such refusal an offense.

The court said:

"It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns, as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in section 41 of the act of October 1, 1890.

"Regulations prescribed by the President and by the heads of Departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and

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may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen where a statute does not distinctly make the neglect in question a criminal offense" (p. 688).

The case under discussion has the element which was lacking in the Eaton case, for a statute has distinctly made the neglect in question a misdemeanor.

The act of July 5, 1884, section 3, makes the Commissioner of Navigation's finding conclusive on all questions of interpretation growing out of the execution of the laws relating to the collection of tonnage tax. (*N. G. L. S. S. Co. v. Hedden*, 43 Fed. Rep., 17-25.)

Among the powers conferred upon Congress by the eighth section of the first article of the Constitution are the following:

"To provide and maintain a navy.

"To make rules for the government and regulation of the land and naval forces."

It was held in *Dynes v. Hoover* (18 How., 20), and the decision has never been questioned, that under this provision of the Constitution Congress has authority to establish courts-martial.

It was further held that the decision of the court-martial in a matter where it has jurisdiction is final and can not be reviewed by the courts. (20 How., 83; *Johnson v. Sayre*, 158 U. S., 109.)

Congress, in establishing courts-martial, provided that the Secretary of the Navy is authorized to establish "regulations of the Navy," with the approval of the President. (12 Stat. L., 565; Rev. Stat., sec. 1547.)

Pursuant to this authority, "regulations for the administration of law and justice" were issued on the 15th of April, 1870.

It has been held that such regulations have the force of law. (*Gratiot v. United States*, 4 How., 80; *Ex parte Reed*, 100 U. S., 22.)

Thus the legislative power is not exercised in detail, but a court is established in pursuance of the power conferred

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upon Congress, and the Secretary of the Navy is clothed with the power of making regulations to control the court.

This is one of the many instances in which it is essential for the operations of a great government that matters of detail be intrusted by the legislative department to executive officers for the purpose of giving effect to legislative acts.

By article 34, Revised Statutes, section 1624, the proceedings of summary courts-martial are to be conducted under such forms and rules as may be prescribed by the Secretary of the Navy with the approval of the President.

Here Congress has constituted a court and it has delegated to an executive officer authority to establish rules for its procedure.

By section 1547, Revised Statutes, the regulations issued by the Secretary of the Navy, and as they might thereafter be altered by him, with the approval of the President, are recognized as the regulations of the Navy.

In pursuance of these regulations, Sayre became "a person in the naval service of the United States." He was tried by a court-martial and the Supreme Court refused to review its findings. (*Johnson v. Sayre*, 158 U. S., 117.)

By an act of June 23, 1874 (18 Stat. L., 237, 240), an appropriation was made to be expended under the direction of the Secretary of War for the repairs, preservation, and completion of certain public works and *inter alia* "for the improvement of the harbor of Savannah."

A like appropriation was made by the act of March 3, 1875 (18 Stat., 459), "for the improvement of the harbor of Savannah, Ga."

Neither of these acts directed the manner in which these appropriations should be expended. The mode of improving the harbor was left to the discretion of the Secretary of War.

The legislative department declared that the improvement should be made, and devolved the determination of what would or would not be an improvement upon the Secretary of War.

It was contended that, while Congress had the power to authorize the construction of a specific work, it could not invest the Secretary of War with such large discretion, and

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that for this reason the act was void. The Supreme Court sustained the act in *South Carolina v. Georgia* (93 U. S., 13).

In that case, acting under the commerce clause, Congress authorized an improvement. It empowered the Secretary of War to determine what would or would not be an improvement, and so the act could not be made effective without the action of the Secretary of War. If he determined the character of the improvement, that was final and the act operated upon it.

In this case Congress makes the obstruction to navigation a misdemeanor. It devolves upon the Secretary of War to determine when there is an obstruction and to give the party a hearing upon the investigation. When this special tribunal has determined that there is an obstruction, then the act operates upon it as in the former case.

In *Miller v. Mayor of New York* (109 U. S., 385, 393, 395) it appeared that Congress authorized the building of a bridge over a river, but the particular bridge authorized was such as should thereafter be approved by the Secretary of War. After the Secretary of War fixed by his approval the character of the bridge which was not an obstruction to navigation, then the act operated upon it and authorized the building of the bridge. Until then the legislative license did not go into effect. Here was a complete act in the abstract, but its operation in the concrete was dependent upon the determination of facts by the special tribunal. It was contended that this was an unlawful delegation of the power vested in Congress. The court held to the contrary, saying:

“By submitting the matter to the Secretary, Congress did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the Secretary of War as an agent to ascertain that fact. Having power to regulate commerce with foreign nations and among the several States, and navigation being a branch of that commerce, it has the control of all navigable waters between the States, or connecting with the ocean, so as to preserve and protect their free navigation. Its power,

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therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive. It may, in direct terms, declare absolutely or on conditions, that a bridge of a particular height shall not be deemed such an obstruction; and, in the latter case, make its declaration take effect when those conditions are complied with. The act in question, in requiring the approval of the Secretary before the construction of the bridge was permitted, was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies or the ascertainment of particular information. The execution of a vast number of measures authorized by Congress, and carried out under the direction of heads of Departments, would be defeated if such were not the case. The efficiency of an act as a declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate." (*South Carolina v. Georgia*, 93 U. S., 13.)

By section 2380, Revised Statutes—

"The President is authorized to reserve from the public lands, whether surveyed or unsurveyed, town sites on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population."

Following strict construction, this would be a delegation by Congress of its legislative power.

In *Currier v. West Side Elevated Patent Ry. Company* (6 Blatch., 487), it was held that authority conferred upon commissioners to approve an experimental elevated railroad and making such approval essential to the continuance in existence of the railroad was not a delegation of legislative power.

The creation of a railroad commission to fix reasonable tolls for freight and passenger transportation is not an unconstitutional delegation of legislative powers. (*Georgia v. Smith*, 70 Ga., 694.)

Neither is giving power to the governor to make pilotage regulations. (*Martin v. Witherspoon*, 135 Mass., 175.)

Navigable Waters—Delegation of Legislative Functions.

The statute providing for the civil service authorizes the Commissioners and the President to make rules for carrying the act into effect, and the President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof. (22 Stat., 403; sec. 1753, Rev. Stat.)

Under the act of February 8, 1887 (24 Stat., 388), power is conferred upon the President, when he shall have determined certain facts, to allot land in severalty to Indians on reservations.

In *Field v. Clark* (143 U. S., 649) it was held that Congress might confer authority upon the President to suspend by proclamation the operation of the law affecting the importation of certain articles, upon his determination that any country producing such articles imposed duties upon the agricultural or other products of the United States which in his opinion were reciprocally unequal or unreasonable.

The court said:

“Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect” (p. 693).

I am of the opinion that the sections in question are not an unconstitutional delegation of the legislative function.

Inasmuch as the bridge was erected by authority of the State before Congress assumed actual jurisdiction over the river for the purposes of navigation, the question arises whether or not the obstruction can be abated without compensation by the United States for the expenses incurred.

The power of Congress to regulate commerce is subject to the limitations of the Fifth Amendment to the Constitution. If property be taken for public use, compensation must be made. (*Monongahela Navigation Co. v. United States*, 148 U. S., 335.)

Here there is no taking of property by the Government. The only requirement is that an obstruction be removed.

Quarantine Regulations.

In *Bridge Company v. United States* (105 U. S., 479) the court said:

"Those who act on State authority alone necessarily assume all the risks of legitimate Congressional interference."

In *Escanaba Company v. Chicago* (107 U. S., 683) the court, speaking of the authority of the State, said:

"When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction."

In *Monongahela Navigation Company v. United States* (148 U. S., 338, 341) the court draws the distinction between the taking of property and the removal of an obstruction.

If States can authorize constructions in or over navigable waters of the United States, and parties thereby can acquire a right against the United States to compensation for their destruction, or cost of change to meet the demands of navigation whenever Congress shall assume actual jurisdiction over such waters, then the power of Congress over the navigable waters of the United States is not supreme.

I am of the opinion that compensation can not be demanded and that you can lawfully proceed as provided for in section 4 of the act of September 19, 1890.

Respectfully,

J. M. DICKINSON,
Acting Attorney-General.

The SECRETARY OF WAR.

QUARANTINE REGULATIONS.

A regulation with respect to quarantining against yellow fever, which provides for an exception in the case of vessels bound for ports of the United States north of the yellow fever danger line, does not constitute a discrimination within the meaning of the quarantine law providing that "all rules and regulations made by the Secretary of the Treasury shall operate uniformly and in no manner discriminate against any port or place."

DEPARTMENT OF JUSTICE,

November 7, 1896.

SIR: I have the honor to acknowledge your communication of October 31 asking my opinion with relation to a quarantine regulation respecting yellow fever. The quarantine law

Actions—Government Retention of Funds in Dispute.

of February 15, 1893, chapter 114, section 3, provides that "all rules and regulations made by the Secretary of the Treasury shall operate uniformly and in no manner discriminate against any port or place." Your regulations with respect to quarantining against yellow fever provide for an exception in the case of "vessels bound for ports in the United States north of the southern boundary of Maryland, with good sanitary condition and history, having had no sickness on board at ports of departure en route or on arrival, provided they have been five days from last infected or suspected port." The Supervising Surgeon-General of the Marine-Hospital Service, in his communication concerning this regulation, says: "It is as absurd to disinfect a ship from Havana at Portland, Me., as it is dangerous not to disinfect one from Havana at New Orleans."

Since our country contains such great variety in climate and sanitary conditions it is clear that every regulation of your Department with relation to quarantine can not with wisdom be made applicable to the whole coast line. I do not think that Congress intended unwisdom in this respect. I do not think that this exception, which in effect covers that part of our coast which is north of the yellow fever danger line, constitutes a discrimination within the meaning of the quarantine act. I therefore advise you that the regulation is lawful.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

ACTIONS—GOVERNMENT RETENTION OF FUNDS IN DISPUTE.

An appearance by parties to a suit in one jurisdiction does not operate as an abandonment of proceedings instituted by them in another jurisdiction, the parties and cause of action being the same.

One may proceed on the same cause of action in as many jurisdictions as he can have service of process executed upon the defendants.

One final judgment on the merits rendered in one action can be pleaded in bar in all the others.

Where funds in the hands of the Secretary of War are involved in a controversy between parties, pending under different forms of procedure in different jurisdictions, the funds should be retained by him until a final adjudication of the whole matter by the tribunal to which the parties may last resort.

Actions—Government Retention of Funds in Dispute.

DEPARTMENT OF JUSTICE,

November 16, 1896.

SIR: I have the honor to acknowledge the receipt of your communication of the 6th instant, reciting the facts of the transaction and of the subsequent litigation between Hammond, Leonard, and Scofield on the one hand and Whaley and Taylor on the other, as to which you request my opinion "whether the legal effect of the appearance by Leonard and Scofield in the supreme court of the District of Columbia, as stated by Mr. Garland, is an abandonment of said proceedings in the supreme court of New York for Kings County and in the United States circuit court for the eastern district of New York."

Having written the opinion of November 2, 1894 (21 Op., 75), called for by your inquiry as to the propriety of delivering to the receiver of the New York court the Treasury draft there referred to, and having had brought to my notice, officially, certain of the subsequent developments of this matter, I gave to your communication and the papers accompanying it careful consideration, and then called upon Mr. A. S. Worthington, a member of the bar of this city, with whom I had occasion heretofore to confer as the legal counsel of Leonard and Scofield. In reply to my inquiries of him I have received from him a written communication of the 12th instant, inclosing a copy of a final judgment rendered on October 24, 1896, at a special term of the supreme court of New York for Kings County in favor of Leonard and Scofield and against Whaley and Taylor, which letter and copy I herewith inclose.

On full consideration of the whole matter, and especially of the briefs of Mr. Garland and the opinion of Judge Cox and the decree rendered thereon, I am of the opinion that the decree made by Judge Cox does not purport to be and was not a final decree on the merits of the controversy between the parties, but was an interlocutory decree denying an application for a temporary injunction and dissolving a preliminary restraining order theretofore awarded.

The reasons given by Judge Cox in his opinion would undoubtedly have supported a decree on the merits in favor

Retirement of Judges—Statutory Construction.

of the defendants if the cause had been brought on to be finally heard on pleadings and proofs.

The appearance of Leonard and Scofield in the supreme court of the District of Columbia did not, in my opinion, operate as an abandonment of the proceedings instituted by them in the supreme court of New York for Kings County.

One may proceed on the same cause of action against the same defendants in as many different jurisdictions as he can have service of process executed upon the defendants. One final judgment on the merits rendered in one action can be pleaded in bar in all the others.

It appears here that final judgment on the merits has been rendered in the New York court, which had obtained jurisdiction over the subject-matter and over all the parties. From that judgment an appeal may be taken by the defendants.

So, too, the proceeding pending in the supreme court of the District of Columbia may be pursued to final judgment or decree, from which an appeal may be taken.

I venture to advise, therefore, on the whole case that the fund in your hands be retained by you until the controversy between these parties, now pending under different forms of procedure and in several jurisdictions, be determined by a final adjudication of the whole matter by the tribunal to which the parties may last resort.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JUDSON HARMON.

The SECRETARY OF WAR.

RETIREMENT OF JUDGES—STATUTORY CONSTRUCTION.

The expression "any judge of any court of the United States," in the statute providing for the retirement of judges on full pay, applies to the chief justice of the Court of Claims as well as to the other judges of that court, and he may retire at the age of 70 provided he shall then have been ten years a duly qualified judge of that court, although he may have held his commission as chief justice thereof less than ten years.

Retirement of Judges—Statutory Construction.

The expression "after having held his commission as such at least ten years," in the same statute, does not mean that the commission under which the judge is serving at the time of his retirement must have been in force ten years, but means being in commission. The reference to the commission was not intended to make the paper title to the office held at the time of the retirement significant, but to make the legal right to act as a Federal judge for ten years the test rather than the actual discharge of the duties of that office.

DEPARTMENT OF JUSTICE,

November 18, 1896.

SIR: I have the honor to submit my opinion, as requested in your letter of the 17th instant.

You state the question and the reason for submitting it as follows:

"Judge Charles C. Nott having served as a judge of the Court of Claims for more than thirty years, I am contemplating his promotion to the chief justiceship of that court, made vacant by the death of Judge Richardson. I am impressed with the belief that the selection of Judge Nott for that place would subserve the public interest and be a just recognition of long and valuable service.

"I desire, however, before finally determining upon my course in the matter, to have your opinion in answer to the following question:

"Would the retirement of Mr. Nott as chief justice of the Court of Claims upon his attaining the age of 70 and before he had served ten years as chief justice deprive him of the benefit of section 714 of the Revised Statutes, providing for the continuance of salary to a judge retiring at the age of 70, after having held his commission as such at least ten years?"

As you desire an answer to this question for your guidance in filling an existing vacancy, the inquiry becomes a present and practical one, which it is my duty, according to the statute and the well-settled practice of the Department, to answer.

The statute involved is as follows:

"SEC. 714. When any judge of any court of the United States resigns his office, after having held his commission as such at least ten years, and having attained the age of 70

Retirement of Judges—Statutory Construction.

years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.”

The objects of this statute are not such as sometimes lead to a strictness of construction which makes the turn of every phrase a justification for reluctance to believe that a meaning was intended, which has not been clearly and unequivocally expressed. On the contrary, there is no reason why this statute should not be fairly construed, reading its terms in the light of the manifest object and purpose of Congress.

The object was to further the good of the public service by providing for the retirement, at full pay, of judges who have reached the age of 70 and been ten years on the bench. The expression “any judge of any court of the United States” was certainly intended to have the widest application; although, if the meaning of this section is to turn on forms of expression, it would not apply to the chief justice of the Court of Claims at all, because, by the act creating the court (Rev. Stat., sec. 1049), “It shall consist of a chief justice and four judges,” etc. All five of these officers are appointed by the President, confirmed by the Senate, hold their offices during good behavior, take the same oath, have the same jurisdiction, and receive the same salary payable in the same way. It is not open to doubt that the retirement act was intended to apply to the chief justice as well as to the judges of that court.

I understand that the doubt which led to your question has been suggested by the phrase “after having held his commission as such at least ten years.” This, it has been thought, may mean that the commission under which the judge is serving at the time of his retirement must have been in force at least ten years. Certainly no such intention is to be extracted from this language without resort to the same technicality which would deny to the chief justice of the Court of Claims the right under this section which the other judges of that court have. The simplest form of expression, and therefore perhaps the most natural, would have been “resigns after having served at least ten years.” But it is a matter of common knowledge that the object of this statute

Retirement of Judges—Statutory Construction.

was not only to offer an additional inducement to enter the judicial service of the United States, but also to encourage the retirement therefrom of men whom age or infirmity make incapable of further service, some of whom, at the time of the passage of the act, had already been for a considerable time wholly disabled. If the form of expression I have above suggested had been used, it might have been claimed that actual service for ten years was required, so that the period of past incapacity would be excluded. It was, in my opinion, to avoid this result that the reference to holding the commission was made instead of reference to holding the office or discharging its duties. This intention seems to me clearly to account for the language used, and at the same time to exclude the idea that any significance was meant to be given to the formal written expression of authority which might, for the time being, be evidence of official character. I am wholly unable to conceive any reason which could have led Congress to a consideration of this feature of the subject, especially with respect to judgeships which are exactly alike in every particular except in name. It was being in commission and not holding a particular commission that Congress meant to make a condition.

Some of the conclusions to which any other construction would lead seem almost absurd. Thus a judge appointed during a recess of Congress receives at once a commission which is valid till the close of the next session. Under this commission, therefore, he may hold office a year. Being confirmed at the close of the next session of the Senate, he receives another commission during good behavior. I can not believe it open to doubt that at the end of ten years from his qualification under his original commission such judge, if seventy years of age, would be entitled to retire on full pay. He would not, however, have "held his commission," i. e., that under which he was then entitled to act as judge for ten years; he would have held it only nine.

In other words, the reference to the commission was not intended to make the paper title to the office held at the time of retirement significant, but to make the lawful right to act as a Federal judge for ten years the test rather than the actual discharge of the duties of that office.

Invalid Pension to Retired Officer—Statutory Construction.

What the result would be in case of the transfer of a judge from one Federal court to another with different jurisdiction and salary, I need not now consider. But I am entirely clear that, in the case submitted, Judge Nott, if appointed chief justice of the Court of Claims, will have the right to avail himself of the privilege given by section 714 upon reaching the age of 70, provided he shall then have been for ten years a duly qualified judge of that court, although he may have held his commission as chief justice thereof less than ten years. So far as section 714 is concerned, the chief justice of the Court of Claims is, as I have before shown, one of the judges thereof, so that Judge Nott will, in case of his proposed appointment, be really holding the same office as before. He will simply have been designated to preside, but the fact that this is done by naming him chief justice and commissioning him as such makes no difference. In many courts the judge is made chief justice whose term will first expire, but this does not change the nature of the office. When he retires he will have "held his commission" as a judge of the Court of Claims, no matter how often the paper expressing his authority may have been rewritten or renewed, from the time he was first entitled to act as a member of that court.

I have the honor to be, with great respect,
JUDSON HARMON.

The PRESIDENT.

INVALID PENSION TO RETIRED OFFICER—STATUTORY
CONSTRUCTION.

A retired officer of the Army is not entitled to draw an invalid pension nor arrears of pension.

The departmental construction of a statute followed.

DEPARTMENT OF JUSTICE,
November 20, 1896.

SIR: I have the honor to acknowledge the receipt of your communication asking reconsideration of my opinion of September 11, 1896, with relation to the claim of Col. John Pulford. That opinion, in holding that Colonel Pulford was entitled to draw an invalid pension prior to 1890, notwithstanding his status as a retired officer of the Army, and

Attorney-General—Refund of Duties.

notwithstanding the statute of April 30, 1844, chapter 15, and section 4724 of the Revised Statutes was based upon the assumption that these statutes had received a departmental construction which makes them wholly inapplicable to the case of officers upon the retired list. You now inform me that further investigation into the records of the Pension Bureau show that this assumption (which was based upon the correspondence between us with reference to this case) was incorrect. The Commissioner of Pensions, on October 13 last, reports to you that section 4724 was construed by the Pension Bureau as applicable to officers upon the retired list of the Army until September 3, 1888, when an exception was recognized in the case of survivors of the Mexican war who drew service pensions. On October 30 he further reports, from an examination of the records of his bureau, "that at no time since 1844 has any pension claim been allowed in behalf of a retired officer or soldier as an invalid pension."

The departmental construction thus appears to sustain the true construction of the statute in question, as held by the Assistant Secretary of the Interior and approved by me. The general rules of statutory construction set forth in my previous opinion thus require a reversal of its conclusion; and I advise you that the applicant is not entitled to the arrears of pension claimed by him.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE INTERIOR.

ATTORNEY-GENERAL—REFUND OF DUTIES.

A mistake on the part of the Treasury Department in estimating the equivalent of the Spanish pound, or libra, in the absence of due protest by the importers, is not sufficient to warrant a refund of the excess of duties paid under such erroneous estimate.

The Secretary of the Treasury is authorized to make a refund of duties where there was an error due to a mutual mistake of fact.

Upon a question of fact the Attorney-General will not give an opinion.

DEPARTMENT OF JUSTICE,

December 3, 1896.

SIR: I have the honor to acknowledge your communication of November 30 asking my opinion as to the claim of B. H. Howell, Son & Co., of New York.

Acquisition of Land by the United States.

It appears that during the year 1895, and up to April 9, 1896, the collectors of customs, under instructions from your Department, estimated the Spanish pound, or libra, as equivalent to 1.0143 pounds avoirdupois; and that on the latter date, upon a report from the Superintendent of the Coast and Geodetic Survey, instructions were issued directing them to estimate it at 1.0161 pounds avoirdupois. The claimants ask for refunds of duties exacted from them during this period by reason of the erroneous instructions, and you ask whether you have authority to reliquidate and refund accordingly.

I think that your questions are answered, so far as they can be answered by this Department, in 21 Opin., 226, 252. Your power under the act of March 3, 1875, chapter 136, can be exercised in case the error was due to a mutual mistake of fact. There was a mistake of fact on the Government's part, but this alone would not be sufficient in the absence of due protest by the importers. Whether there was also a mistake of fact on the importers' part is a question of fact, and it is well settled that upon questions of fact I can not advise you.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

ACQUISITION OF LAND BY THE UNITED STATES.

The Secretary of the Treasury without further authority than the act of March 3, 1891, may accept a voluntary grant of land from the city of Saginaw, Mich., to be used for the purposes of a public building.

No legislation of Congress is needed to enable the United States to take and hold land by voluntary gift, devise, or grant.

The United States in their sovereign capacity have power to acquire and hold real property wherever and whenever such property is needed for the use of the Government in the execution of any of its powers.

Such property may be acquired by any means by which natural or artificial persons may acquire property subject in certain cases to the local laws of the States.

Acquisition of Land by the United States.

DEPARTMENT OF JUSTICE,

December 11, 1896.

SIR: I have the honor to acknowledge the receipt of your communication of November 25, requesting my opinion as to whether further legislation by Congress is needed to enable the United States to accept a voluntary grant of land from the city of Saginaw, in the State of Michigan, which has been tendered on the following state of facts, recited in your letter:

By act of Congress approved March 3, 1891 (26 Stat., 1094), you were authorized and directed to acquire, by purchase, condemnation, or otherwise, a site and cause to be erected thereon a suitable public building in the city of Saginaw, Mich.

Subsequently the city of Saginaw donated to the United States the land needed for the purpose.

Still later, and at the request of the city of Saginaw, Congress by act of August 27, 1894 (28 Stat., 590), directed you to reconvey to the city of Saginaw that portion of the land previously granted which it desired to repossess.

It now appears that the city of Saginaw has discovered that it does not need the portion of land reconveyed to it and desires to restore it to the United States.

It appears that the State of Michigan has by proper legislation authorized the United States to acquire land within the limits of the State for public uses and has ceded to the United States exclusive jurisdiction over all lands already or thereafter to be acquired by them.

It appears that the portion of land which the city of Saginaw now proposes to reconvey to the United States can be beneficially used in connection with the land on which the Government building stands and will add to the comfort, convenience, and enjoyment of the public buildings and grounds.

The United States in their sovereign capacity have power to acquire and hold real property wherever and whenever such property is needed for the use of the Government in the execution of any of its powers. Such property may be acquired by any of the means by which natural or artificial persons may acquire property, subject in certain cases to the local laws of the States.

Attorney-General—Premiums.

No legislation by Congress is needed to enable the United States to take and hold by voluntary gift, devise, or grant, although such authority appears to have been expressly conferred in this case by the act of March 3, 1891, which authorizes you to acquire land "by purchase, condemnation, or otherwise."

I have therefore to say that you may "without further authority from Congress accept and use the additional land referred to," and that no "additional act or cession by the legislature of the State of Michigan will be necessary."

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL—PREMIUMS.

Where no occasion has arisen for the official action of the Secretary of War, the Attorney-General will not give an opinion upon a question proposed by him.

The contract with the Pneumatic Gun Carriage and Power Company for the construction of a disappearing gun carriage, under the act of August 1, 1894, makes no provision for the payment of a premium and does not bind the Government beyond the amount appropriated.

DEPARTMENT OF JUSTICE,
December 24, 1896.

SIR: I have the honor to acknowledge the receipt of your letter of November 7, 1896, in which you state the following:

"In 1893 the United States entered into contract with the Morgan Engineering Company, of Alliance, Ohio, for one Gordon disappearing carriage for 10-inch B. L. rifle, the contract containing the plan of the carriage which was agreed to be constructed, and also provisions and conditions relative to all matters pertaining to the construction, the price to be paid therefor, the manner and times of payments of the price, and many other matters.

"On February 22, 1894, the Pneumatic Gun Carriage and Power Company wrote a letter submitting a plan of a gun

Attorney-General-Premiums.

carriage which it desired to construct for the United States, and containing also the provisions and conditions of the contract which it proposed to enter into with the United States.

"The act making appropriations for fortifications, etc., approved August 1, 1894 (28 Stat., 214), authorized and directed the Secretary of War to contract with the Pneumatic Gun Carriage and Power Company for one 10-inch pneumatic disappearing gun carriage 'which shall be constructed on the general plan submitted by the company to the Board of Ordnance and Fortification in its letter dated February twenty-second, eighteen hundred and ninety-four, and shall be capable of being traversed and the gun elevated and depressed by either pneumatic, electric, or hand power, and the details of said plan may be modified, changed, and improved in the discretion of the company.'

"The act appropriated for the purchase of the said pneumatic carriage the sum of \$50,000, or so much thereof as may be necessary, and further provided that '*the same conditions relative to the platform, ammunition, and payments, and so forth*, embodied in the contract for the Gordon ten-inch counterpoise carriage shall apply to the pneumatic carriage, and the same facilities for carrying out the contract for the counterpoise carriage shall be extended to the pneumatic carriage.'

"Under date of November 5, 1894, the United States entered into a contract with the Pneumatic Gun Carriage and Power Company for the carriage authorized by said act of August 1, 1894, for the sum of \$50,000, *the full amount appropriated for the carriage*. In view of the provisions of section 3732, Revised Statutes, and the doubt as to whether the said act of August 1, 1894, authorized the Secretary of War to enter into contract to pay premiums which would make the cost of the carriage exceed the amount appropriated therefor, no provision for the payment of premiums for rapidity of fire was inserted in the contract. In the contract for the Gordon carriage (in the advertisement and instructions attached thereto) it is provided that 'the carriage should be such as to permit of the firing of the service 10-inch rifle therefrom ten (10) times in one hour, using hand power only, and there

Attorney-General—Premiums.

shall be a deduction of \$1,000 from the contract price agreed upon for each round less than this number in said time, and a bonus of \$2,000 for each round greater than this number.'

"Under this provision in the contract for the Gordon carriage and the provision in said act of August 1, 1894, that 'the same conditions relative to the platform, ammunition, and payments, and so forth, embodied in the contract for the Gordon ten-inch counterpoise carriage shall apply to the pneumatic carriage,' the Pneumatic Gun Carriage and Power Company claims that it is entitled to a bonus of \$2,000 for each shot fired in one hour in excess of twelve shots, the number required by the contract, although the contract price is \$50,000, the full amount appropriated for the carriage."

You ask for an opinion—

"As to whether under said act of Congress of August 1, 1894, the Pneumatic Gun Carriage and Power Company is entitled to a premium of \$2,000 for each shot that may be fired in an hour in excess of twelve shots."

The act in question appropriated a specific sum, viz, \$50,000, to "procure and test one 10-inch pneumatic disappearing gun carriage." The Secretary of War was "authorized and directed to contract with the Pneumatic Gun Carriage and Power Company, of Washington, District of Columbia, without advertising, for such carriage."

The full amount of the appropriation is absorbed in the contract price for making and delivering the carriage.

The contract which was made between the parties does not purport to bind the Government beyond the amount appropriated.

In view of these facts I do not see that any occasion has arisen for your official action in regard to the payment of premiums, and therefore, in accordance with the uniform practice of this Department, I must decline to express an opinion upon the question proposed by you.

Respectfully,

JUDSON HARMON.

The SECRETARY OF WAR.

Slaughter of Diseased Animals.

SLAUGHTER OF DISEASED ANIMALS.

By the act of August 30, 1890, providing that the Secretary of Agriculture may cause to be slaughtered certain animals adjudged to be infected with disease, or to have been exposed to infection, and providing the manner in which the value of the animals so slaughtered as exposed, but not infected, shall be ascertained and paid, but that no payment shall be made for any animal imported in violation of the act, Congress intended that the exposed animals imported in violation of the act are to be slaughtered, as well as the others.

The authority of the Department of Agriculture to seize and slaughter the animals without compensation by the Government is doubtful.

The Secretary is to adopt and enforce regulations for adjudging whether or not the animals are diseased, or have been exposed to disease so as to be dangerous, and, without having regard to possible claims, to resort to slaughtering if, in his judgment, such a measure is required to prevent the spread of the disease among animals in this country.

DEPARTMENT OF JUSTICE,

January 4, 1897.

SIR: I have your letter of the 2d instant asking my opinion as to the right of your Department to slaughter sheep imported by J. B. Manby, of Trinidad, Colo., quarantined at Santa Fe stock yards, at El Paso, Tex., and found to be affected with scab.

Section 6 of the act of August 30, 1890, makes it a penal offense, with fine and imprisonment, to knowingly import sheep, etc., affected with disease, or sheep, etc., which have been exposed within sixty days to such disease. This provision is to be enforced, as any other criminal law, by court and jury.

Section 7 authorizes the Secretary of Agriculture to quarantine all sheep, etc., imported.

Section 8 prohibits their importation except at quarantine ports; and provides that the Secretary of Agriculture may cause to be slaughtered such of the animals named in this act as may be, under regulations prescribed by him, adjudged to be infected, or to have been exposed to infection so as to be dangerous to other animals; and that the value of animals so slaughtered as exposed but not infected may be ascertained by agreement or appraisal by persons appointed by the Secretary, whose decision to be final, and paid out of any money in the Treasury not otherwise appropriated;

Slaughter of Diseased Animals.

"but no payment shall be made for any animal imported in violation of the provisions of this act." This would seem to mean that no payment shall be made for any exposed animal, as well as none for any diseased animal, if imported in violation of the act; and to provide a summary method of appraisal and payment in the case of animals *exposed*, but *not* imported in violation of the act. Undoubtedly, however, the exposed animals imported in violation of the act were intended to be slaughtered, as well as the others, and this slaughtering was to be of them and the others indiscriminately, without regard to any question of illegal importation and with a view to preventing the spread of disease, etc. It is to be "adjudged" that the animals are diseased or exposed so as to be dangerous; not that they were illegally imported. That question arises before the Secretary or at the Treasury only for the purpose of passing upon claims for payment under section 8 of the act.

I am not prepared to say that a wrong decision of such a question by the Secretary of Agriculture, or at the Treasury, would have any greater effect than a decision by the Comptroller of the Treasury in matters of accounts and claims generally; that no claims could be maintained in court for compensation for the slaughtering of sheep "adjudged" to be diseased or to have been exposed to disease, and erroneously believed to have been imported in violation of the law, or that no other claims could be made. I therefore answer your question whether any doubt can be raised as to the authority of your Department to seize and slaughter the sheep in question without compensation by the Government, by saying that there is such doubt.

As to what action it is necessary for you to take to guard against such claims, I am clearly of opinion that you are not expected to do more than adopt and enforce regulations for adjudging whether or not the sheep are diseased or have been exposed to disease so as to be dangerous, and, without having regard to possible claims, to resort to slaughtering if, in your judgment, such a measure is required by the purposes of the law, e. g., to prevent the spread of disease among animals in this country.

 Grants to States—Statutory Construction.

An appraisement should be had, in order that, if any of these sheep were *not* imported in violation of law, payment may be made for those exposed to disease, as directed by section 8 of the act referred to.

Respectfully,

JUDSON HARMON.

The SECRETARY OF AGRICULTURE.

GRANTS TO STATES—STATUTORY CONSTRUCTION.

The provisions of the act of March 3, 1875, granting certain sections of unappropriated public lands within the State of Colorado to the State for penitentiary purposes, to be selected and located by direction of the legislature with the approval of the President of the United States on or before a specified date, are not directory, as Congress had no right to give directions to the legislature of a State, but are in the nature of conditions precedent, and can only be given effect as conditions, and a failure by the designated authorities to select and locate the lands within the time named, renders the grant inoperative. After the expiration of said time the President is not authorized to approve a selection and location of said lands.

DEPARTMENT OF JUSTICE,

January 4, 1897.

SIR: I have the honor to submit my opinion as requested in your letter of September 1 last, with which you sent to me a letter to you from the Secretary of the Interior, dated August 20, 1896, asking your approval of a list of lands selected by the State of Colorado for penitentiary purposes under section 9 of the act of March 3, 1875 (18 Stat., 474). The Secretary refers to the decision by one of his predecessors, of February 27, 1890 (10 L. D., 222), on the application by said State for certain salt lands granted it by section 11 of that act, in which "it was held that the provisions of that section requiring the State to make its selection of salt lands within two years after the admission of the State is directory only, and failure to select within the period specified does not work a forfeiture of the grant."

You request that I advise you "as to the correctness of the ruling of the Interior Department referred to * * * and whether under section 9 of the law passed March 3,

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1875 (18 Stat., 474), the President may approve selections of land for penitentiary purposes made by the State of Colorado after the first day of January, 1878."

The act referred to was the enabling act under which Colorado was admitted into the Union. Section 7 granted to the State sections Nos. 16 and 36 in every township for the support of common schools. Section 8 likewise granted "fifty entire sections of the unappropriated public lands within said State *to be selected and located by direction of the legislature thereof, and with the approval of the President, on or before the first day of January, 1878, * * ** in legal subdivisions of not less than one-quarter section, * * * for the purpose of erecting public buildings at the capital of said State for legislative and judicial purposes." Section 9 is as follows:

"That fifty other entire sections of land as aforesaid, *to be selected and located and with the approval as aforesaid*, shall be, and they are hereby, granted to said State for the purpose of erecting a suitable building for a penitentiary or State prison in the manner aforesaid."

The language of section 8 with reference to time and manner of selection and location is plainly incorporated by reference in section 9, and the question is whether, the time named having passed without any action looking to the selection and location of lands under section 9, the State still has the right to select and locate them.

Section 11, to which the decision of the Secretary of the Interior above cited referred, provided—

"That all salt springs within said State, not exceeding twelve in number, with six sections of land adjoining, and as contiguous as may be to each, shall be granted to said State for its use, *the said land to be selected by the governor of said State within two years after the admission of the State,*" etc.

I do not concur in the opinion of the Secretary. The authorities which he cites to support his conclusion relate to laws containing directions to public officers subject to the control of the legislature which passed them, specifying the time and manner in which public duties were to be performed. These provisions as to time and manner were, in

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the cases cited, held to be directory only, the intention having been manifest to require the duty to be performed and nothing appearing to indicate that the action of the officer was to fail in case, for any reason, the directions as to time and manner should not be strictly followed. As stated in one of the passages quoted (p. 225), such provisions "seem to be generally understood to be merely instructions for the guidance and government of those on whom the duty is imposed, or directory only. The neglect of them may be punishable, indeed, but it does not affect the validity of the act done in disregard of them."

To the same effect are the quotations (p. 224) from *French v. Edwards* (13 Wall., 506) and those from other cases.

As the terms "directory" and "mandatory" import, this rule of construction applies only to statutes giving directions or commands to officers or bodies whose action is under the control of the law-making power, and I think the error of the Secretary was in applying this rule to a law making a grant. Congress had no right to give directions to the legislature or to the governor of the State of Colorado, and can not, by the proper construction of the act, be held to have undertaken to do so. On the contrary, the act simply granted various quantities of land for different State purposes. There was no condition with respect to the school lands, the sections being designated by numbers; but the sections granted for the erection of public buildings and those granted for a penitentiary building were to be selected and located by the legislature on or before a date named, while the salt springs and adjoining sections were to be selected by the governor within a fixed period after the admission of the State.

The propriety of treating the provisions of any statute as directory only has been questioned, and although the right of courts to do so in proper cases is established, they exercise it only with reluctance and in extraordinary cases. (*Dreyfus v. Bridges*, 45 Miss., 247; *Best v. Gholson*, 89 Ill., 465.) The distinction between the class of cases to which this rule applies and those to which it does not is well stated in Endlich on Interpretation of Statutes, section 433:

"Where powers or rights are granted, with a direction that certain regulations or formalities shall be complied with. it

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seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred; and it is therefore probable that such was the intention of the legislature. But when a public duty is imposed, and the statute requires that it shall be performed in a certain manner or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative."

Whether the usual rule of strict construction which usually applies to grants by the Government is to be adopted with respect to a grant to a State, and whether the grant in question was one *in presenti* which, upon the selection and location of the lands, with the approval of the President, would take effect as of the date of the act, are questions which I think immaterial, because the intention of Congress was manifest to make the selection and location of the lands in the manner and within the time named conditions of the grant. It is not to be assumed that Congress had no purpose in designating separate agencies and different periods for the selection and location of the lands, nor is it necessary for officers intrusted with the execution of the law to inquire what that purpose was. It is sufficient that the statute plainly provides that the selection and location shall be made within a time specifically named.

As these provisions of the act can not be construed as directions to those whom Congress had no right to direct they can only be given effect as conditions which, if not complied with, prevent the grants from being effectual. They are not, strictly speaking, conditions subsequent, even if the grants be considered as *in presenti* in the sense above mentioned, and therefore are not to be regarded with the disfavor commonly shown to such conditions. They are rather in the nature of conditions precedent. The various decisions by the Supreme Court of the United States (146 U. S., 593 and cases cited) holding, for the protection of the grantees, that grants of this nature, when the selection is made or the lands otherwise defined relate back to the date of the grant, do

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not conflict with my view that failure by the designated authorities of the State to select and locate the lands within the times named renders the grant inoperative. Properly speaking, the grant is not forfeited or defeated after it has taken effect. It merely failed to take effect because, being a mere floating grant, the necessary steps to cause it to attach to specific lands were not taken.

It will be noticed that the President's approval was required with respect to the selection and location of the lands granted by sections 8, 9, and 10, but not with respect to those granted by section 11.

My opinion is that you are not now authorized to give your approval to the proposed selection and location of lands under section 9.

Very respectfully,

JUDSON HARMON.

The PRESIDENT.

MAKAH INDIANS—SEALS.

The Makah Indians are prohibited, as other persons generally, by the act of April 6, 1894, from killing seals at a time and in a certain part of the Pacific Ocean named in the act, and the only right they can claim is that of sealing in the particular manner and places permitted in explicit terms by section 6 of the act to coast Indians generally.

While Indians are not commonly understood to be embraced by laws of Congress, yet they may be and often are, and whether they are or not is a question of intent.

DEPARTMENT OF JUSTICE,

January 5, 1897.

SIR: I have received from you the following request for an opinion:

“Replying to your letter of the 11th instant, in reply to the letter of this Department, dated the 4th instant, concerning the killing of certain seals by Makah Indians, I have the honor to transmit a copy of a letter from the United States attorney for the District of Washington, stating, in reply to an inquiry of this Department, that the question whether the Makah Indians came within the exemption of section 6 of the act of Congress of April 6, 1894, was not presented or considered or determined by the court.

Makah Indians—Seals.

“I have now the honor to ask your opinion whether the said Indians are included within the prohibition of section 6 of the act of April 6, 1894?”

The section of law referred to does not directly prohibit, but provides that the foregoing sections, which do contain prohibitions, shall not apply to “Indians dwelling on the coast of the United States and taking fur seals in canoes or undecked boats propelled wholly by paddles, oars, or sails, and not transported by or used in connection with other vessels, or manned by more than five persons, in the manner practiced by said Indians.” Sealing by these particular coast Indians in the manner thus particularly described is excepted from the prohibitions of the foregoing sections. Section 6 then proceeds to say that “the exception made in this section shall not apply to Indians *in the employment of other persons*, or who shall kill, capture, or pursue seals outside of territorial waters *under contract* to deliver the skins to other persons, nor to the waters of Bering Sea or of the passes of the Aleutian Islands.” Which means that not even in the manner described in the section can Indians take seals who are not acting for themselves, but are employees of others, or are under contract to deliver the skins to others, etc.

Section 6 is, therefore, permissive rather than prohibitory; but I understand the question to be whether the Makah Indians can take seals in a manner not the one particularly described in section 6; in other words, whether the general prohibitions of the act apply to the Makah Indians or do not apply to them because they are Indians or Makah Indians, and not white persons.

The two Governments of Great Britain and the United States adopted a treaty of arbitration, which resulted in an award. This award is set out in full in the act of April 6, 1894, entitled “An act to give effect to the award,” etc. The award provides that the Governments “shall forbid their citizens and subjects, respectively,” to kill, etc., within a certain zone, and “shall forbid their citizens and subjects, respectively,” to kill, etc., at a certain time, in a certain part of the Pacific Ocean, inclusive of Bering Sea. Among other

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articles of the award set forth in the law, article 8 contains almost the identical words of section 6 of the law.

Now, while the word "subjects" is used in treaties and international awards chiefly because the inhabitants of monarchies are called subjects instead of citizens, and that word alone would not indicate that Indians were in the minds of the arbitrators; yet article 8 clearly shows that Indians were intended to be included among subjects in this particular award. That article expressly excepts or exempts coast Indians sealing in the particular manner described in section 6 of the law, and the conclusion is irresistible that other Indians or Indians sealing in other manners were intended to be embraced among the subjects who were to be forbidden to kill, etc.

So also, while Indians are not commonly understood to be embraced by laws of Congress, yet they may be, and often are, and whether they are or not is a question of intent. It can not be doubted that the intent here was to carry out the award, which we must presume Congress to have rightly understood. When, therefore, Congress passes a law purporting to be for that purpose, using instead of the words "citizens and subjects" the words "citizen of the United States, or person owing the duty of obedience to the laws or treaties of the United States," Congress, in my opinion, intended the same persons whom the award intended, including Indians.

There is nothing in the recent history of our Indians and their treatment by the Government which makes it improbable that Congress would regard them as owing the duty of obedience to a treaty between this country and Great Britain concerning international affairs, or obedience to the laws of the United States when intended to apply to them. On the contrary, all recent dealings between the Government and our Indians have been in accordance with the theory that they owe obedience to our laws as subjects and many of them as citizens.

I therefore answer your question whether the Makah Indians are included within the prohibition of section 6 of the act of April 6, 1894, by saying that they are prohibited as other persons by the act generally, and that the only right

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they can claim is that of sealing in the particular manner and places permitted in explicit terms by section 6 of the law to coast Indians generally.

Respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

UNDATED BONDS.

A bond accompanying a bid to build certain public works, duly signed, sealed, and delivered, the separate proposals constituting the bid and the bond being on printed blanks bound together and consecutively paged in print, is not sufficiently defective to be regarded as invalid because the date of the bid and bond are not inserted in the blanks left for that purpose in printing the instrument.

The date is no part of the substance of a sealed instrument, and need not necessarily be inserted. The real date is the time of its delivery, which may always be proved.

In specific cases the Secretary of War is authorized to waive formal defects in bids and bonds in order to secure the public advantage resulting from competitive bidding.

DEPARTMENT OF JUSTICE,

January 9, 1897.

SIR: I have the honor to give my opinion as requested in your indorsement, dated December 30 last, on the letter of John M. Wilson, colonel of Engineers, U. S. A., to Brig. Gen. William P. Craighill, Chief Engineer, U. S. A., upon the question "whether the bond accompanying the bid inclosed is, in view of the terms of the specifications, sufficiently defective to require me to regard the same as invalid."

The bid inclosed is that of Hughes Bros. & Bangs for building "extension of breakwater and sand-catch pier at Buffalo, N. Y." The bond is "guaranty to accompany proposal," signed and sealed by two persons, whose signatures are duly witnessed and who have executed affidavits indorsed thereon as to their property qualifications. The plans and specifications on which proposals are invited, the separate proposals constituting the bid, and the bond are all on printed blanks bound together and consecutively paged in print, the bond being upon part of the same sheet

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with the signatures of Hughes Bros. and Bangs to the proposals, so that it is clear that the bid and guaranty were, when executed and delivered, mechanically and inseparably connected.

The objections suggested to the sufficiency of the bond, as appears from the letter above mentioned, and from that of Thomas W. Symons, major, Corps of Engineers, to General Craighill, which you also send, are that the date of the bid and that of the bond are not inserted in the blanks left for that purpose in printing the instrument. The bond or guaranty undertakes "that if the bid of Hughes Bros. & Bangs, herewith accompanying, dated ———, 1896, for furnishing material and labor for extension of breakwater and sand-catch pier at Buffalo, N. Y., be accepted * * * within sixty days from the date of the opening of proposals therefor, the said bidder will, within ten days after notice of such acceptance, enter into a contract with the proper officer of the United States," etc.

In my opinion this bond is not sufficiently defective to require you to regard the same as invalid. On the contrary, I think the obligation is valid and binding, notwithstanding the failure to insert the dates above mentioned. The naming of the bidders, the proper designation of the work to be done, and the reference to the bid as accompanying the bond are quite sufficient to connect the undertaking with its subject; so that certainly, unless the same bidders during the year 1896 made more than one bid for this identical work, the date of the bid, if inserted, would add nothing essential to the instrument, and its omission deprives it of nothing.

It is well settled that the date is no part of the substance of a sealed instrument and not necessary to be inserted. The real date is the time of its delivery, which may always be proved (2 Johnson, 234; 20 N. Y., 333). The fact which the letters mention, that the affidavits indorsed on the bond, being dated November 24, 1896, show it was signed before the bid itself, which is dated November 28, 1896, is therefore entirely immaterial. If November 24 appeared on the face of the instrument as the date of its execution, it would be perfectly valid. It is often impracticable to procure signatures to such bonds before or at the time the proposal is signed,

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and the mere dates of the bid and the bond are of no legal consequence since both take effect only at the time of delivery, and there is no reason why such a bond may not be executed before the signing of the bid and entrusted to the bidder with authority to deliver it together with the bid.

The Secretary of War is authorized (20 Stat., 36) to prescribe rules and regulations for the preparation, submission, and opening of bids relating to his Department. He is authorized (22 Stat., 487) to require a written guaranty with each bid of the tenor and effect of the one now submitted. But it is entirely within his authority to waive informalities, and this has been done generally by Army Regulation, 639.

He is also authorized in specific cases to waive formal defects in bids and bonds in order to secure the public advantage resulting from competitive bidding which it was the intention of Congress to secure, and which would often be lost by exacting strict compliance with all the formalities required (10 Opin., 140; 15 Opin., 226).

Therefore, notwithstanding section 17 of the general instructions which accompany the invitations for proposals, which requires that "all blank spaces in the proposal and bond must be filled in," etc., you might disregard the failure to do so, even without "the right to * * * waive any informality in the bids," reserved by section 22 of said instructions.

I return herewith the papers submitted by you.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF WAR.

CONTRACTS—STATUTORY CONSTRUCTION.

An act of Congress authorizing the Secretary of War to contract for the improvement of the Chicago River "as far as may be permitted by existing docks and wharves," confines the improvements within existing docks and wharves.

DEPARTMENT OF JUSTICE,

January 11, 1897.

SIR: I have your communication of January the 7th, in which you recite the provision in the river and harbor act of

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June 3, 1896, for the improvement of the Chicago River, which is as follows:

“For improving the Chicago River, in Illinois, from its mouth to the stock yards on the South Branch, and to Belmont avenue on the North Branch, as far as may be permitted by existing docks and wharves, to be dredged to admit passage by vessels drawing sixteen feet of water, according to the recommendation of Captain W. L. Marshall, of the corps of Engineers of the United States Army, in his report under date of August ninth, eighteen hundred and ninety-three: Continuing improvement, fifty thousand dollars: *Provided*, That contracts may be entered into by the Secretary of War for such materials and work as may be necessary to complete the said project of improvement, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate six hundred and fifty thousand dollars, exclusive of the amount herein and heretofore appropriated.”

And also certain extracts from the report of Maj. (then Capt.) W. L. Marshall, Corps of Engineers, dated August 9, 1893.

You request my opinion “as to whether, under the above quoted extract from the river and harbor act of June 3, 1896, the authority of the Secretary of War to make contracts is confined to improvements within existing docks and wharves, or whether it also extends to making contracts for (1) dredging, for removing wharves and docks, and widening channel, (2) rebuilding wharves and docks in widened places, and (3) acquiring right of way in widened places.”

The language of the act of June 3, 1896, appears to be free from obscurity or ambiguity. It provides for improving the Chicago River “*as far as may be permitted by existing docks and wharves.*”

This certainly does not contemplate the removal of wharves or docks, or for the rebuilding of wharves or docks, or for “acquiring the right of way.”

The object of the act appears to be the improvement of the Chicago River by dredging the same “to admit passage by vessels drawing sixteen feet of water.”

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Whatever may be involved in dredging the river to admit passage by vessels drawing sixteen feet of water, is embraced within the authority granted by the act; but I do not understand the dredging of the river "so far as may be permitted by existing docks and wharves" involves the removal of such docks and wharves, or the rebuilding of any docks and wharves, or the acquisition of any right of way in widened places.

Very respectfully,

HOLMES CONRAD,
Acting Attorney-General.

The SECRETARY OF WAR.

REVOCABLE LICENSE—ELLIS ISLAND.

The Secretary of the Treasury may grant a license, revocable at his will, to use a portion of Ellis Island, an immigrant station, for the purpose of erecting and maintaining an exhibiting hall and conducting a land and labor bureau.

DEPARTMENT OF JUSTICE,
January 11, 1897.

SIR: I beg to acknowledge the receipt of the opinion of the Solicitor of the Treasury of June 4, 1896, which, by your indorsement thereon, is "referred to the Attorney-General for an expression of opinion as to the right of the Secretary of the Treasury to lease or license for a term of years the use of a portion of Ellis Island, an immigrant station, for the purpose of erecting and maintaining an exhibition hall and conducting a land and labor bureau, as recommended in the report of the Immigration Investigation Commission (pp. 46, 47)."

I have carefully considered the opinion of the Solicitor of the Treasury, together with the letter to you of May 4, 1896, from Mr. Charles A. Hess, and the letter of May 4, 1896, from Mr. Hess to the Hon. Herman Stump, Commissioner of Immigration, with the indorsements thereon.

I concur entirely in the conclusion reached by the Solicitor of the Treasury.

Very respectfully,

HOLMES CONRAD,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

Bonded Warehouses for Imported Rice—Duties.

[NOTE.—The conclusion of the Solicitor of the Treasury was as follows:

“I am of the opinion that he (Secretary of the Treasury) may, without violating any law or statute of the United States, grant to the company when organized a license to erect and maintain a building for the purposes proposed on Ellis Island, the license to be made revocable at the will of the Secretary.” (See 21 Opin., 476).—E. C. B.]

BONDED WAREHOUSES FOR IMPORTED RICE—DUTIES.

The act of March 24, 1874, chapter 65, concerning bonded warehouses for storage of imported rice is still in force.

Warehousemen of importers' bonded warehouses for the storage and cleansing of imported rice intended for exportation to foreign countries may withdraw for consumption, instead of exporting, certain by-products resulting from the manufacture, viz, rice meal and broken rice.

The duty on these by-products should be assessed upon the proportion of uncleaned rice represented by these by-products, rather than on the latter themselves, regarded as an independent importation.

DEPARTMENT OF JUSTICE,

January 21, 1897.

SIR: I have the honor to acknowledge your communication of December 14, asking an opinion with relation to the act of March 24, 1874, chapter 65, concerning bonded warehouses for the storage of imported rice. This statute is as follows:

“That from and after the passage of this act importers' bonded warehouses, to be used for the storage and cleansing of imported rice intended for exportation to foreign countries, may be established at any port of entry in the United States, under such rules and regulations as the Secretary of the Treasury may prescribe.”

It appears that up to the present time no application has been made for the establishment of such a warehouse. The first question naturally arising is whether the statute is still in force. I find no statute directly repealing it, and I think that it is not superseded by the tariff act of August 28, 1894, chapter 349, section 9, providing for bonded warehouses for manufactures in whole or in part of imported materials. For

Bonded Warehouses for Imported Rice—Duties.

the cleansing of rice does not seem to be a process of manufacture within the meaning of our laws. (*Junge v. Hedden*, 146 U. S., 233, 239; *Patton v. United States*, 159 U. S., 500, 509, and cases cited.)

It appears, however, that, besides the cleaned rice which is to be exported, there are certain by-products resulting from the manufacture which are of some commercial value, namely, rice meal and broken rice. The applicant desires the privilege, in case he shall establish his proposed warehouse, to withdraw these by-products for consumption instead of exporting them; and your first question is whether this may lawfully be done. I answer this question in the affirmative. Your power to prescribe rules and regulations for these warehouses is a wide one. It is certainly a very reasonable regulation that the by-products, which apparently are not sufficiently valuable to warrant their exportation, should be utilized, and not wasted. If it had been intended by Congress that the regulations should prohibit the withdrawal for consumption of any such by-products, I think that it would have said so, as in Revised Statutes, section 3433.

Your second question relates to the rate of duty which should be assessed upon these by-products. You say:

“Would the by-products, such as broken rice and rice meal, withdrawn for consumption, be dutiable as such, or should the duty be assessed on the quantity of imported uncleaned rice consumed in the production of the by-products?”

I am supplied by the applicant with figures from which it would appear that there is very little waste in this cleansing process. From 1,000 pounds of uncleaned rice of average quality there is a waste of 25 pounds, while there results 800 pounds of cleaned rice and 175 pounds of by-products. The duty on the uncleaned rice imported is eight-tenths of a cent a pound, while the duty on the by-products when imported is one-fourth of a cent a pound.

Such analogies as exist would indicate an intent in Congress that the duty exacted upon the by-products when withdrawn for consumption under your proposed regulations should be assessed upon the proportion of uncleaned rice

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represented by these by-products (rather than on the latter themselves regarded as an independent importation). This view is confirmed by an examination of the general provisions of law relating to warehoused goods. Section 2983 of the Revised Statutes provides that in no case shall there be any abatement of the duties made for any deterioration in the warehoused merchandise. From the Government's point of view a change in condition from that of uncleaned rice to that of one of these by-products is a deterioration.

Answering your second question, therefore, it is my opinion that the duties imposed should be at the rate of eight-tenths of a cent per pound.

Very respectfully,

EDWARD B. WHITNEY,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

LEASE OF GOVERNMENT PROPERTY—ELLIS ISLAND.

The Secretary of the Treasury has no power to lease for a term of years, or for any length of time, the property of the Government placed in his charge without express authority of law, though he may license the use thereof.

He has no authority to lease any part of Ellis Island.

He has power under section 9 of the act of March 3, 1893, to grant exclusive privileges in connection with Ellis Island immigrant station, after public competition, subject to such limitations and conditions as he may prescribe.

There can not strictly be a lease of a use.

DEPARTMENT OF JUSTICE,
January 25, 1897.

SIR: In response to a request made through the Hon. Herman Stump, Commissioner-General of Immigration, of January 20, 1897, I beg to supplement the opinion of January 11, 1897, heretofore forwarded to you in response to your indorsement of January 7 on the opinion of the Solicitor of the Treasury. This indorsement referred the opinion of the Solicitor to me "for an expression of opinion as to the right of the Secretary of the Treasury to lease or license, for a term of years, the use of a portion of Ellis Island, an immigrant station, for the purpose of erecting and maintaining

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an exhibition hall and conducting a land and labor bureau, as recommended in the report of the Immigration and Investigation Committee (pp. 46 and 47)."

The Solicitor of the Treasury concludes his lengthy opinion with the statement:

"I am of the opinion that he (Secretary of the Treasury) may, without violating any law or statute of the United States, grant to the company when organized a license to erect and maintain a building for the purposes proposed on Ellis Island, the license to be made revocable at the will of the Secretary."

I confined the expression of my former opinion to a concurrence in the conclusions reached by the Solicitor of the Treasury, which meant no more than that the Secretary of the Treasury had the lawful authority to grant to any one a license to use the property for the purpose indicated.

I purposely limited the expression of my opinion to the matter of *license*, because the opinion of the Solicitor of the Treasury went no further, and because the language of your indorsement seemed necessarily to contemplate a license, although the word "leased" was used. It speaks of the right "to lease or license for a term of years the use of a portion of Ellis Island."

There can not strictly be the lease of a use.

The Secretary of the Treasury has not the power to lease for a term of years, or for any length of time, the property of the Government placed in his charge without express authority of law therefor; and no such authority exists under which he can lease any part of Ellis Island.

Section 3749, Revised Statutes, authorizes the Solicitor of the Treasury, with the approval of the Secretary of the Treasury, to lease or sell a certain class of lands belonging to the United States.

And section 3208, Revised Statutes, authorizes the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to "sell and dispose of" another class of lands belonging to the United States.

And paragraph 4 of the act of March 3, 1879 (20 Stat., 377, Sup. Rev. Stat., p. 251), authorizes the Secretary of the Treasury to lease, at his discretion, for a period not exceed-

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ing five years, "such unoccupied and unproductive property of the United States under his control for the leasing of which there is no authority under existing laws."

But under none of these provisions of the statutes can authority be found for the Secretary of the Treasury to lease any part of Ellis Island, which is both productive and occupied.

Section 9 of the act of March 3, 1893 (27 Stats., 569), confers upon the Secretary of the Treasury the power to grant exclusive privileges in connection with Ellis Island immigrant station, after public competition, subject to such conditions and limitations as he may prescribe.

Very respectfully,

HOLMES CONRAD,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL—STATE BONDS.

Under section 356 of the Revised Statutes the head of an executive department is authorized to require the opinion of the Attorney-General only on questions arising in the administration of his department.

As a recourse to law on the part of the Secretary of the Treasury for the settlement and collection of certain bonds made and issued by certain States and owned by the United States would involve the very grave act of suing States, and as Congress has had this question repeatedly before it and has not directed such a course, the Secretary of the Treasury should not institute any suit.

DEPARTMENT OF JUSTICE,
January 25, 1897.

SIR: I have the honor to acknowledge the receipt of your letter of December 16, 1896, in which, after setting out that the United States is the owner of certain bonds made and issued by the States of Arkansas, Florida, Louisiana, North Carolina, South Carolina, Tennessee, and Virginia, aggregating \$2,075,466.66½, you request an opinion "as to what legal proceedings may be taken, if any, by the Secretary of the Treasury, or the Treasury Department, under existing legislation, for the settlement or collection of these bonds; and if any such power should exist, how the same may be

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exercised; and if no such power or authority should be found to belong to the Secretary of the Treasury, or the Treasury Department, in whom, then, if in any, does such power or authority reside, and how may the same be exercised?"

I shall confine my answer to that portion of your inquiry which relates to the power of your Department and its exercise, inasmuch as under section 356 of the Revised Statutes the head of an executive department is authorized to require the opinion of the Attorney-General only on questions arising in the administration of his department.

There is no act authorizing you to compromise this indebtedness.

The first step toward enforcing the payment of these bonds would be a suit by the United States to recover judgment against the several States.

Assuming that such a suit could be maintained in the Supreme Court of the United States, under the authority of *United States v. Texas* (143 U. S., 621), the inquiry arises whether or not you have the authority, or having it, should institute such a suit.

As appears by your letter, all of these bonds were formerly in the Indian trust fund, except \$538,000, bonds of the State of Arkansas, which were received from the Smithsonian Institution.

The question of the collection of these bonds has been repeatedly before the Interior and Treasury Departments and Congress.

In December, 1867, Attorney-General Stanbery, in a report made to Congress concerning certain of these bonds, said:

"I am at a loss to suggest any specific measure for further security in respect to these bonds. But it may happen that the indebted States and corporations may offer propositions for compromise favorable to the bondholders, and Congress may deem it expedient to give the Secretary of the Interior or the Secretary of the Treasury authority to entertain, and, in the exercise of a proper discretion, to agree to such propositions." (Ex. Doc. 59, H. R., 40th Cong., 2d sess.)

On May 28, 1885, the Treasurer of the United States asked the Secretary of the Interior, the trustee of the

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Indian fund, for instructions in reference to the collection of the unpaid principal and interest of the bonds then belonging to the Indian trust fund. On August 7, 1885, Secretary Lamar, reviewing the opinion of Attorney-General Stanbery, replied, saying that he did "not consider it necessary or proper that any further means should be attempted with reference to the collection of the unpaid principal and interest of the bonds under consideration until appropriate legislation therefor shall have been enacted by Congress."

The report of the Secretary of the Treasury for the fiscal year ending June 30, 1886, calls attention to the necessity for legislative action, as follows:

"The bonds held by this office should receive the serious attention of the legislative power, the greater part of these bonds having been lying in the vaults of the Treasury, paying no interest save such as may have been sequestered from sums due the respective defaulting States, notwithstanding that these States have in great part compromised with their creditors, and are now paying interest on a part of the whole of their debt."

House bill 6913, Fifty-third Congress, page 59, contained the following provision:

"The Secretary of the Treasury is authorized and directed to sell and dispose of said bonds, with the accumulated interest thereon, at the best price that can be realized for the same, and to that end he shall at once advertise for thirty days, inviting sealed proposals, and shall accept only such bids as may equal or exceed the face value of the principal of such bonds as the bidder proposes to buy."

This was stricken from the bill as enacted.

Congress has annually appropriated for the payment of the interest on this trust fund.

In 1870 Congress passed an act which, as section 3481 of the Revised Statutes, is as follows:

"Whenever any State is in default in the payment of interest or principal on investments in stocks or bonds issued or guaranteed by such State and held by the United States in trust, the Secretary of the Treasury shall retain the whole, or so much thereof as may be necessary, of any moneys due on any account from the United States to such

Chinese Certificates.

State, and apply the same to the payment of such principal and interest, or either, or to the reimbursement, with interest thereon, of moneys advanced by the United States on account of interest due on such stocks or bonds."

This is the only legislation that I know of looking to the collection of these bonds. I find no general statute making it your duty to sue on this class of claims.

As a recourse to law on your part would involve the very grave act of suing States, and as Congress has had this question repeatedly before it and has not directed such a proceeding, I am of the opinion that you should not institute any suit.

Respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

CHINESE CERTIFICATES.

Certificates presented by Chinese persons as evidence of their right to enter this country for the first time, conformably to the provisions of section 6 of the act of July 5, 1884, signed by a Chinese consul-general within the United States, are not entitled to be treated as made by the Chinese Government within the meaning of the said act, notwithstanding the fact that the Chinese minister had by letter communicated to the Secretary of State the information that his Government had "authorized the consuls of China in foreign countries to issue" such certificates.

DEPARTMENT OF JUSTICE,

February 2, 1897.

SIR: I have your letter of the 16th ultimo, asking my opinion upon the following facts stated:

"On the 30th ultimo, the collector of customs at San Francisco transmitted to the Department certificates which had been transmitted to him by three Chinese persons as evidence of their right to enter this country for the first time, conformably to the provisions of section 6 of the act approved July 5, 1884. (Stat. L., vol. 23, p. 115.) The certificates were signed by the Chinese consul-general at San Francisco, and bore the seal and visé of the United States consul at Hong-kong, as required by said act. The collector refused permission to land to the holders of the certificates, it being held

Chinese Certificates.

by him that such papers, issued to residents of China by a Chinese consular officer in this country, did not constitute a compliance with the requirements of the act cited above. Exception to his action having been taken by the attorney for the Chinese persons named in the certificates, the collector requests instructions in the premises."

It appears from the inclosures of your letter that the Chinese in question started from *Canton* to come to the United States, going by way of the British island of Hongkong. No explanation is afforded of the absence of a certificate issued at Canton or Hongkong.

Your letter is accompanied by an opinion by the solicitor of the Treasury to the effect that, the Chinese minister having, by letter of June 2, 1891, communicated to the Secretary of State the information that his Government had "authorized the consuls of China in foreign countries to issue" such certificates, and this being a "foreign country" (or "other country," as it is put by the Secretary of the Treasury in acknowledging a copy of the minister's letter;) the consul-general at San Francisco has been authorized to issue them.

The communication from the minister is quoted, and makes the general statement that Chinese consuls in foreign countries have been authorized to grant such certificates; but if the authorization is so expressed, I can not attribute to the Chinese Government ignorance or disregard of the very reasonable principle that what is within the letter is not within the law if not within the intent. It could not well have been intended by a decree of authorization so worded that the Chinese consul in Japan should certify to the characteristics, etc., of a person about to depart from Siam for the United States; still less that the Chinese consuls in the United States should certify to the characteristics, etc., of persons about to depart from any other country than the United States to go to the United States. Neither is it necessary to presume that the Chinese consul-general at San Francisco has been authorized to act because he has acted. As he is not a plenipotentiary diplomatic representative of China, but merely a consul, and as the general laws and customs relating to consuls do not impose upon him the duty of making such certificates, no presumption arises that he has

Deserting Seamen.

authority to make them, and there is no evidence of such authority with respect to persons leaving China for the United States.

It is not my province to inquire into matters of fact. So far as you have presented the facts, they do not, in my opinion, show the certificates in question to be entitled to be treated as made by the Chinese Government within the meaning of section 6 of the act of Congress of July 5, 1884.

Respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

DESERTING SEAMEN.

Section 4598 of the Revised Statutes does not apply to a seaman, engaged in the coastwise trade of the United States, shipped before a shipping commissioner, who may have signed a contract to perform a voyage and then absented himself from the vessel without leave from the proper officer, unless he contracted with a vessel of the burden of fifty tons or upward, required by section 4520 of the Revised Statutes to have formal contracts with their seamen.

DEPARTMENT OF JUSTICE,

February 2, 1897.

SIR: I have your letter of the 21st ultimo, asking my opinion upon the question whether section 4598 of the Revised Statutes "applies to a seaman engaged in the coastwise trade of the United States, shipped before a shipping commissioner, if he shall have signed a contract to perform a voyage and shall absent himself from the vessel without leave from the proper officer."

The section mentioned occurs under the general title of "merchant seamen," and is found to contain provisions concerning the summary treatment of a deserting seaman "who shall have signed a contract to perform a voyage." He is to be brought before any justice of the peace upon complaint of the master, and "if it then appears that he has signed a contract within the intent and meaning of this Title, and that the voyage agreed for is not finished or altered or the contract otherwise dissolved," etc., the justice shall commit him to jail, to remain until the vessel shall be ready to proceed on

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her voyage or the master shall require his discharge, and then to be delivered to the master.

This approaches the enforcement of "involuntary servitude," but has been held not to be unconstitutional. See *Robertson et al. v. U. S.*, and *Barry Baldwin*, U. S. Sup. Ct.; not yet reported.

I do not find in "this Title" a definition of contract, and therefore understand the words "a contract within the intent and meaning of this Title" to refer to the particular contracts the forms and ceremonies of which are fully set forth in the Title. (Rev. Stat., 4511, 4512, 4520.) This interpretation seems to be the more reasonable because such a formal contract, "in writing or in print," containing certain particulars about the nature and duration of the voyage, the time at which the seaman is to be on board, etc., etc., might well be used before the justice of the peace in a summary proceeding; but that magistrate might find much difficulty in dealing summarily with mere oral or informal agreements.

By the act of June 19, 1886, section 2, it is provided that shipping commissioners may ship and discharge crews for any vessel engaged in the coastwise trade, trade with Canada, Newfoundland, Mexico, etc., at the request of the master or owner, the fees to be one-half those prescribed by Rev. Stat., 4612. It will be observed that, unlike the contracts required by Rev. Stat., 4511, etc., these contracts are wholly optional.

From this section 2, and from the terms of Rev. Stat., 4511, itself, it is clear that the contracts covered by the latter are required only of masters of vessels bound from a port in the United States to *any foreign port*, except British American, Mexican, etc., and not of masters of vessels engaged in the coastwise trade.

By act of August 19, 1890, it is provided that when a crew is shipped by a shipping commissioner for any vessel engaged in the coastwise, British American, etc., trades, as authorized by section 2 of the act of June 19, 1886, an agreement shall be made in the same manner and form as is provided by Rev. Stat., 4511 and 4512, and the law makes the provisions of Rev. Stat., 4522, and numerous other sections of Title "Merchant seamen," including section 4598, the one now in

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question, extend to and embrace such vessels in the coastwise trade, etc., where their crews have been shipped by a shipping commissioner, "to the same extent and with the same effect as if said vessels had been mentioned and embraced in the language and terms of said sections."

On February 18, 1895, an act was passed entitled an act to amend the last-named act, providing that said act "is hereby amended so as to read as follows:"

Then come the provisions that when a crew is shipped by a shipping commissioner for any vessel in the coastwise trade, etc., as authorized by the act of June 19, 1886, an agreement shall be made as provided by Rev. Stat., 4511 and 4512, except the sixth, seventh, and eighth items of section 4511; that such seamen shall be discharged and receive their wages as provided in clause 1 of Rev. Stat., 4529, and also by sections 4526, 4527, etc., etc., mentioning numerous sections of Title "Merchant seamen," but not mentioning section 4598, now in question; and the law further requires that "in all other respects such shipment of seamen and such shipping agreement shall be regarded as if both shipment and agreement had been entered into between the master of a vessel and a seaman without going before a shipping commissioner."

The last clause above quoted seems to refer to the unwritten or informal agreements customary with such vessels, and alluded to in Rev. Stat., 4513.

The form and manner of amendment here used leave no doubt that the provision of the act extending section 4598 to coastwise vessels is repealed; that is to say, that the new law is intended to be substituted for and wholly supplant the old. Without the express extension, thus repealed, section 4598 seems not to have included coastwise vessels, because, as already said, the masters of those vessels did not enter into "a contract within the intent and meaning of this Title."

Under the latest law contracts which may but are not required to be made as provided in cases under "this Title" of the Revised Statutes are not contracts of the same class, but a new class made in part only under the provisions of Rev. Stat., 4511.

Northern Pacific Railroad Land Grant.

I have already suggested that the phrase "a contract within the intent and meaning of this Title" seems to refer to contracts the formalities of which are fully prescribed under the Title "Merchant seamen" in the Revised Statutes. There are two kinds of such contracts, one concerning foreign-going vessels, and the other concerning vessels "of the burden of 50 tons or upward bound from a port in one State to a port in any other than an adjoining State, except vessels of the burden of 75 tons or upward bound from a port on the Atlantic to a port on the Pacific, or vice versa." (Rev. Stat., 4520-4523.) Other shipping contracts are mentioned under "this Title," so that the phrase "a contract within the intent and meaning of this Title" is not clear and might possibly mean any shipping contract; but I do not think it does, for this reason, in addition to those already given, viz: That section 4598, as originally enacted, July 20, 1790, did not have that meaning, but the one which I now attribute to it. An examination of the act of July 20, 1790, shows that what is now Rev. Stat., 4598, referred to formal contracts in writing or in print, required by section 1 to be entered into by every master of a ship bound "to any foreign port, or of any ship or vessel of the burden of 50 tons or upward bound from a port in one State to a port in any other than an adjoining State." Voyages to and from the Pacific were not considered at that date. The words "this Title" have been substituted in the revision for "this act" in the original law.

I therefore answer your question in the negative, with the explanation that section 4598 does apply to vessels of the burden of 50 tons or upward, required by Rev. Stat., 4520, to have formal contracts with their seamen.

Respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

NORTHERN PACIFIC RAILROAD LAND GRANT.

The Northern Pacific Railroad Company, having completed and put in operation the railroad and telegraph lines authorized by the act of July 2, 1864, the condition of the grant to said company of certain lands mentioned in said act has been fully performed, and the right to have the lands patented was perfect in said company.

Northern Pacific Railroad Land Grant.

By its consent to the issuing of bonds, secured by mortgage on the railway and telegraph lines, Congress necessarily consented to their transfer to the purchaser in case of foreclosure, who, however, by operation of law, whether a natural or artificial person, and, if the latter, no matter how or by what authority created, would take the property subject to all the continuing rights of the Federal Government, just as the original company held it.

The mortgages issued by the Northern Pacific Railroad Company having been foreclosed, and all of the property, rights, and franchises of the company sold at judicial sale to the Northern Pacific Railway Company, a Wisconsin corporation, and the latter having asked for the patenting to it, or to purchasers from it, of certain lands granted by the act of 1864, the Secretary of the Interior is not justified in refusing to issue such patents, but should act upon applications of the *railway* company for patents upon the same considerations which would govern in case there had been no foreclosure and the applications were made by the *railroad* company.

DEPARTMENT OF JUSTICE,

February 6, 1897.

SIR: I have the honor to acknowledge your letter of the 29th ultimo, with which you transmitted, for my consideration, communications addressed to you, "with respect to the propriety of issuing patents to the Northern Pacific Railway Company."

Following the settled practice of the Attorneys-General, I might refuse the opinion requested, because you do not state the points you wish to submit, but leave them to be gathered from the communications, which are somewhat voluminous. As, however, your letter shows that you require my opinion for your guidance in the discharge of official duties, and that both public and private interests require that it should be promptly given, I answer your question as it is put, which is as follows:

"I, therefore, request that you will, at your earliest convenience, advise me whether or not I am justified in withholding patents from the Northern Pacific Railway Company on the grounds urged in the communication."

The act of July 2, 1864 (13 Stats., 365), created the Northern Pacific Railroad Company, and authorized it to construct a railroad and telegraph line from Lake Superior to Puget Sound. For the purpose of aiding the construction of such railroad and telegraph line, and "to secure the safe and

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speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway," certain lands were granted to said company, *its successors and assigns* (sec. 3). For these lands patents were to be issued as the lines should be completed, in sections of twenty-five miles each, "in a good, substantial, and workmanlike manner," as found and reported by commissioners (sec. 4). The road was to be a post route and military road, subject to the use of the United States, and also subject to such regulations as Congress may impose concerning charges for Government transportation (sec. 11).

Section 10 forbade the issue of "mortgage or construction bonds," except by the consent of Congress; but on March 1, 1869 (15 Stats., 346), such consent was given to the issue of bonds, secured by mortgage upon the railroad and telegraph lines, for the purpose of raising funds with which to construct the same. On May 31, 1870 (16 Stats., 378), consent was again given. Bonds were accordingly issued and secured by mortgage, with the proceeds of which the railroad and telegraph lines were finally completed and put in operation.

The act of August 7, 1888 (25 Stats., 382), requiring all companies which the Government had aided to construct railroad and telegraph lines thereafter to maintain and operate their telegraph lines "and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them," applied to the Northern Pacific as well as to other companies, but it has no bearing on the present question. Its only object was to prevent the transfer of the telegraphic business of such companies to other companies.

Congress has by none of the acts or resolutions above named in anywise waived or relinquished the rights reserved by the original act, save in so far as such waiver or relinquishment results from the consent to the issue of bonds and the execution of mortgages.

In 1896 the mortgages so issued were foreclosed and all the property, rights, and franchises of the company were sold at judicial sale to the Northern Pacific Railway Company, a Wisconsin corporation, which purchaser has entered into possession and claims ownership of the railroad and telegraph lines, lands, and property of the Northern Pacific

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Railroad Company. It is stated that the real purchasers were bondholders and creditors of the old company, who have incorporated as the new company; but this, if true, appears to me to have no legal effect whatever.

It is asserted that the new company, by taking possession of the property of the old one and operating its lines under the Wisconsin charter, has abandoned and repudiated the act of July 2, 1864, by which the Government's rights were reserved and secured and the grant of lands was made, and has thereby forfeited all right to such lands.

A copy of Senate Resolution 124, Fifty-fourth Congress, first session, is attached to one of the communications, which resolution, it is averred, was drawn and urged for passage by the parties interested in the purchase at foreclosure as aforesaid, but Congress refused to pass it. This merely serves to show that the desire of the purchasers was to have a Federal charter for the new company and that they resorted to the State charter only upon their failure to secure one from Congress. Although the joint resolution of 1870, *supra*, authorized a mortgage on all the property of the company, "including its franchise as a corporation," the counsel in charge of the reorganization were certainly justified under the decisions in advising a new act of incorporation, instead of endeavoring to work out a transfer of the corporate existence of the old company to the new one through the foreclosure proceedings.

It is not suggested that the new company has, in fact, in anywise denied or repudiated, or threatened to deny or repudiate, its obligations to perform all the duties and fulfill all the obligations imposed by the original act. Such repudiation is charged only as a legal consequence of the succession of the new corporation to the old.

The new company having asked for the patenting to it, or to purchasers from it, of certain lands granted by the act of 1864, objection is made by the communications aforesaid to your issuing such patents. The reasons are, in a word, that, as the Government has lost, as against the new company, the rights which it reserved against the old one in consideration of which the lands were granted, its obligation to patent the remainder of the lands covered by the grant has also ceased.

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I deem it unnecessary to follow in detail the numerous and highly technical arguments filed with you in support of the above objections, because they appear to me to have no bearing on the question to be answered. The consideration for the grant of lands was the construction and maintenance of a railroad and telegraph line across the continent, in which enterprise the Government had an interest on its own behalf as well as on that of its citizens. These lines have long since been completed and in operation. The condition of the grant, therefore, has been fully performed and the right to have the lands patented was perfect in the old company. (See section 4 of original act, above cited.) I find no further condition in any of the laws that the right to the lands, when so perfected by the completion of the enterprise, would be lost by denial or attempted denial to the Government of any of its continuing rights in or to the property. Congress contented itself with reserving such rights without making their unquestioned enjoyment a condition of forfeiture of the lands granted.

By its consent to the issuing of bonds secured by mortgage on the railway and telegraph lines Congress necessarily consented to their transfer to the purchaser in case of foreclosure, who, however, by operation of law, whether a natural or artificial person, and, if the latter, no matter how or by what authority created, would take the property subject to all the continuing rights of the Federal Government just as the original company held it. I know of no reason why the Government may not enforce all the rights reserved to it by the particular laws in question, or those which it has generally with respect to post routes and interstate commerce, quite as well against the State corporation which now owns and operates the property as it could have done against the old company. Certainly in its assent to the mortgages Congress made no conditions as to the corporate character of the purchaser in case of foreclosure.

In short, the argument presented to you is that the company which now applies for the patents has no right to them, because the Government has lost, as against it, the rights in consideration of which it granted the lands. The argument is unsound for two reasons: First, the premise is not true,

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and second, if it were true, the result would not follow for the reasons given above. The right of the old company to the lands granted, which was perfected by the completion of its lines, passed to the purchaser under foreclosure of all its property and rights. These lands were already fully earned. They were subject to no condition subsequent.

My opinion is that you are not justified in refusing to issue patents to the Northern Pacific Railway Company for the reasons stated in the communications submitted to me, but that you should act upon applications for patents by the new company upon exactly the same considerations which would govern you in case there had been no foreclosure and the applications were made by the old company.

Respectfully,

JUDSON HARMON.

The SECRETARY OF THE INTERIOR.

ARMY OFFICERS.

The President has authority to assign enlisted men of the Army, who have passed the examination as candidates for commissions, to vacancies that may exist in any corps or arm of the service in which they have been commissioned, notwithstanding the fact that additional lieutenants remain in other corps unassigned.

DEPARTMENT OF JUSTICE,

February 9, 1897.

SIR: I have the honor to acknowledge your letter of the 5th instant, in which you request my opinion as to the "authority of the President to assign enlisted men who have passed the examination as candidates for commissions to vacancies that may exist in any corps of the line of the Army while additional second lieutenants remain in other corps unassigned."

You refer me to the opinion of Acting Attorney-General Maury (20 Opin., 149), in which somewhat the same question was considered.

Under existing statutes commissions as second lieutenants are conferred upon graduates of the United States Military Academy and upon such enlisted men as may satisfactorily pass the examinations provided for in the act of July 30, 1892 (27 Stat., 336), which provides:

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"SEC. 3. That the vacancies in the grade of second lieutenant, heretofore filled by the promotion of meritorious noncommissioned officers of the Army, under the provisions of section 3 of the act approved June 18, 1878, shall be filled by the appointment of competitors favorably recommended under this act, in the order of merit established by the final examination."

By act of October 1, 1890 (26 Stat., 562), it was provided:

"And hereafter all appointments in the line of the Army shall be by commission in an arm of the service and not by commission in any particular regiment."

A commission is not conferred upon one as a second lieutenant in the line of the Army *generally*, but only as a second lieutenant in the infantry, cavalry, or artillery arm, or in the engineer or ordnance, or other corps of the Army.

By act of May 17, 1886 (24 Stat., 50), a graduate of the United States Military Academy "may be promoted and commissioned as a second lieutenant in any arm or corps of the Army in which there may be a vacancy *and the duties of which he may have been judged competent to perform.*"

This act further provides that—

"In case there shall not, at the time, be a vacancy in *such* arm or corps, he may, at the discretion of the President, be promoted and commissioned *in it* as an additional second lieutenant, with the usual pay and allowances of a second lieutenant until a vacancy shall happen."

So that not only is the graduate commissioned in some specific arm or corps of the Army, "the duties of which he may have been judged competent to perform," but if at the time of his graduation no vacancy exists in the arm or corps for which he may have been judged competent, then the President is authorized to commission him in such arm or corps as an additional second lieutenant.

No authority is given the President to assign an officer who has been commissioned in one arm or corps of the Army to fill a vacancy in any other arm or corps of the Army the duties of which he has not been judged competent to perform.

The enlisted men who, under the provisions of the act of July 30, 1892, have been "favorably recommended" to fill the "vacancies in the grade of second lieutenant heretofore

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filled by the promotion of meritorious noncommissioned officers of the Army" are commissioned under the act of October 1, 1890 (26 Stat., 561), "in an arm of the service."

Noncommissioned officers, under section 1214, Revised Statutes, were "eligible for appointment as second lieutenants in any corps of the line for which they may be found so qualified. If there be no vacancy in such corps, any noncommissioned officer so found qualified for a commission therein may be attached to it by the President as a supernumerary officer by brevet of second lieutenant, subject to the provisions of section 1215."

So that, as to both graduates of the United States Military Academy and enlisted men favorably recommended for promotion, the like provision applied, i. e., they were each commissioned in the arm or corps of the Army for which they were found to be severally qualified. And the President was not authorized to assign them to any other arm or corps, but was required to attach them to the arm or corps in which they were commissioned as "additional" or "supernumerary" lieutenants.

The law governing promotions in the Army (Rev. Stats., sec. 1204) provides:

"Promotions in the line shall be made through the whole Army in its several lines of artillery, cavalry, and infantry, respectively."

So, too, as to transfers. The act of October 1, 1890, provides:

"SEC. 2. That officers of grades in each arm of the service shall be assigned to regiments and transferred from one regiment to another as the interests of the service may require by order from the War Department."

It appears, then, that throughout the whole structure of the Army and the scheme of its organization the principle prevails of keeping separate and distinct the several arms and corps of which the Army is constituted, of confining promotions and transfers of officers to the arm or corps in which such officer is commissioned. And while authority is expressly given to the President to assign or attach candidates for commissions in the Army, whether graduates of the United States Military Academy or enlisted men favorably recommended for commission, such authority is in every

Remittance of Forfeiture of Recognizance.

case limited to the assignment of these persons to the arm or corps of the Army in which they have been found qualified to serve.

Keeping in view, then, the language of the statutes, their spirit, purpose, and intent, as manifested by past legislation and by the course of policy pursued since the foundation of the Military Academy at West Point, I am of opinion that the President has authority to assign enlisted men who have passed the examination as candidates for commissions to vacancies that may exist in any corps or arm of the service in which they have been commissioned, notwithstanding the fact that additional second lieutenants remain in other corps unassigned.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JUDSON HARMON.

The SECRETARY OF WAR.

REMITTANCE OF FORFEITURE OF RECOGNIZANCE.

Outside of the District of Columbia the President has no power to remit the forfeiture of a judgment on a recognizance.

The power to compromise claims in favor of the United States, which includes judgments on recognizances, is vested by law in the Secretary of the Treasury with respect to all claims save those arising under the postal laws.

DEPARTMENT OF JUSTICE,
February 11, 1897.

SIR: Pursuant to the reference, dated the 8th instant, indorsed on the application made to you for remittance of forfeiture of judgment on recognizance in *United States v. Neikirk et al.*, I have the honor to give my opinion on the question whether you have the power in the premises.

In *United States v. Cookendorfer* (5 Cranch C. C., 113), which has been cited to you, it was held that "after the term in which a recognizance has been forfeited in a criminal case the court can not remit the forfeiture, but the President of the United States can under act of Congress of June 17, 1812."

Contracts—Premiums.

But that case arose in the District of Columbia, to which the operation of the act cited was expressly limited (2 Stats., p. 752). There is no statute giving the President power to remit forfeitures elsewhere; and his power to pardon offenses does not include the right to remit forfeitures (10 Opin., 452; 11 Opin., 124).

The power to compromise claims in favor of the United States, which include judgments on recognizance, is vested by law in the Secretary of the Treasury, who may act upon the report of the district attorney, special agent, or the Solicitor of the Treasury with respect to all claims save those arising under the postal laws (Rev. Stat., 3469). He may, of course, compromise claims for a nominal consideration when the circumstances justify such a course, but neither he nor any other officer, save the President with respect to forfeited recognizance in the District of Columbia only, has power to remit or waive judgments on forfeited bonds.

As the application before you relates to a judgment in the district of Kentucky, my opinion is that you have no power to act thereon.

Very respectfully,

JUDSON HARMON.

The PRESIDENT.

CONTRACTS—PREMIUMS.

Where, by act of Congress, the Secretary of War was authorized and directed to contract with the Pneumatic Gun Carriage and Power Company for the purchase of a certain gun carriage, without advertising, and in the same act a specific sum of money was appropriated for the purpose of procuring such gun, and no express or implied authority was given by the act to bind the Government beyond the amount appropriated, the Secretary of War, by making the contract for the full amount appropriated, exhausted his authority and could not make a supplemental contract binding the Government for further expenditures.

DEPARTMENT OF JUSTICE,

February 20, 1897.

SIR: I have the honor to acknowledge the receipt of your letter of February 18, 1897, in which you state the following:

“On February 22, 1894, the Pneumatic Gun Carriage and Power Company wrote a letter, submitting a plan of a gun

Contracts—Premiums.

carriage which it desired to construct for the United States and containing also the provisions and conditions of the contract which it proposed to enter into with the United States.

“The act making appropriations for fortifications, etc., approved August 1, 1894 (28 Stat., 214), authorized and directed the Secretary of War to contract with the Pneumatic Gun Carriage and Power Company for one 10-inch pneumatic disappearing gun carriage, ‘which shall be constructed on the general plan submitted by the company to the Board of Ordnance and Fortification in its letter, dated February twenty-second, eighteen hundred and ninety-four, and shall be capable of being traversed and the gun elevated and depressed by either pneumatic, electric, or hand power, and the details of said plan may be modified, changed, and improved in the discretion of the company.’

“The act appropriated for the purchase of the said pneumatic carriage the sum of \$50,000, or so much thereof as may be necessary, and further provided that ‘*the same conditions relative to the platform, ammunition, and payments, and so forth*, embodied in the contract for the Gordon ten-inch counterpoise carriage shall apply to the pneumatic carriage, and the same facilities for carrying out the contract for the counterpoise carriage shall be extended to the pneumatic carriage.’

“Under date of November 5, 1894, the United States entered into a contract with the Pneumatic Gun Carriage and Power Company for the carriage authorized by said act of August 1, 1894, for the sum of \$50,000, *the full amount appropriated for the carriage*. In view of the provisions of section 3732, Revised Statutes, and the doubt as to whether the said act of August 1, 1894, authorized the Secretary of War to enter into contract to pay premiums which would make the cost of the carriage exceed the amount appropriated therefor, no provision for the payment of premiums for rapidity of fire was inserted in the contract. In the contract for the Gordon carriage (in the advertisement and instructions attached thereto) it is provided that ‘the carriage should be such as to permit of the firing of the service 10-inch rifle therefrom ten (10) times in one hour, using

Contracts—Premiums.

hand-power only, and there shall be a deduction of \$1,000 from the contract price agreed upon for each round less than this number in said time, and *a bonus of \$2,000 for each round greater than this number.*

“In view of this provision in the Gordon contract the Pneumatic Gun Carriage and Power Company claimed, at the time of entering into its said contract on November 5, 1894, that it was entitled to a bonus of \$2,000 for each shot fired in one hour in excess of twelve shots, the number required by its contract, and to have a contract therefor to bind the Government to pay the same out of future appropriations made by Congress, although the price fixed for the purchase of the carriage by the contract entered into at that time is \$50,000, the full amount appropriated for the carriage. And, as it is said, for the purpose of expediting matters the contract was entered into at that time without the stipulation in regard to premiums, with the understanding between the then Acting Secretary of War and the company that the question of the authority of the Secretary of War under the said act of August 1, 1894, to contract for premiums, as requested, would be submitted to the law officers of the Government, and that if they held that the act gave the Secretary of War such authority a supplemental contract would be entered into to pay such premiums.

“The application for the Secretary of War to enter into such a supplemental contract is now pending in this Department, and you are respectfully requested to render an opinion as to whether he has authority to do so.”

Section 3732 of the Revised Statutes provides that:

“No contract or purchase on behalf the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year.”

The act approved August 1, 1894 (28 Stat., 214), appropriated a specific sum, viz., \$50,000, to “procure and test one 10-inch pneumatic disappearing gun carriage.”

The Secretary of War was “authorized and directed to contract with the Pneumatic Gun Carriage and Power Com-

Deposit of Savings by Seamen.

pany, of Washington, District of Columbia, without advertising for such carriage."

The full amount of the appropriation was absorbed in the contract price for making and delivering the carriage.

No express authority was given you by this act to bind the Government beyond the amount appropriated. There is no such implied authority from the provision that—

"The same conditions relative to the platform, ammunition, and payments, and so forth, embodied in the contract for the Gordon 10-inch counterpoise carriage shall apply to the pneumatic carriage, and the same facilities for carrying out the contract for the counterpoise carriage shall be extended to the pneumatic carriage."

The word "payments" refers to the time and manner of payment, and was not intended to have the effect of increasing the appropriation or conferring power to contract for an indefinite amount.

My opinion is that in making the contract for the full amount of the appropriation you exhausted your authority under the act, and that you are not authorized to make any supplemental contract binding the Government to further expenditures.

Respectfully,

JUDSON HARMON.

The SECRETARY OF WAR.

DEPOSIT OF SAVINGS BY SEAMEN.

Paymasters of the Navy may receive from enlisted men or petty officers, for deposit, under the act of February 9, 1889, accumulated savings of any amount, provided they represent the earnings of such a person as an enlisted man or petty officer in the United States Navy.

DEPARTMENT OF JUSTICE,

February 24, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of the 11th instant, inclosing copies of a letter, dated the 4th ultimo, from the commanding officer of the U. S. S. *San Francisco*, and the indorsements thereon relative to the authority of the paymaster of said vessel to receive as a deposit, under the provisions of the act entitled "An act to provide for the deposit of the savings of seamen

Deposit of Savings by Seamen.

of the United States Navy," approved February 9, 1889 (25 Stat., 657), the sum of \$900 from the chief boatswain's mate of the vessel.

You say—

"In view of the practice in the Army and Navy, as stated in the indorsement on said letter of the Chief of the Bureau of Supplies and Accounts, I have the honor to request an expression of your opinion as to whether the money offered by the chief boatswain's mate may be received by the paymaster, subject to the provisions of the act of Congress above mentioned."

The act referred to provides:

"That any enlisted man or appointed petty officer of the Navy, may deposit his savings in sums not less than five dollars with the paymaster, upon whose books his account is borne, and he shall be furnished with a deposit book in which said paymaster shall note over his signature the amount, date, and place of such deposit."

The act further provides that the money so deposited "shall be accounted for in the same manner as other public funds"; and—

"SEC. 3. That the system of deposits herein established shall be carried into execution under such regulations as may be established by the Secretary of the Navy."

Article 1488 of the United States Navy Regulations, 1893, provides:

"Enlisted men of the Navy, and petty officers, may deposit with the pay officer upon whose books their accounts are borne, any portion of the savings accruing from their pay, and with the approval of the commanding officer savings from other sources on board ship, in sums not less than five dollars, the same to remain so deposited until final payment on discharge: *Provided*, That the sum of at least twenty-five dollars shall remain to the credit of such depositors on the rolls of the pay officers."

The statute authorizes the petty officer, or seaman, to deposit his *savings*.

The Navy Regulations provide for the deposit "of the savings accruing from their pay" and also "savings from other sources on board ship."

Deposit of Savings by Seaman.

The statute provides that the amount so deposited "shall not be permitted to be paid until final payment on discharge," and the Navy Regulations make similar provision.

Enlistments for duty on board cruising vessels for the Navy are for a term of three years general service; and enlisted men in the naval service are only entitled to their discharge upon the expiration of their term of service.

The doubt suggested in the letters accompanying your communication is as to whether an enlisted man, or petty officer, in the United States Navy may be permitted under this statute to deposit with the paymaster accumulated savings from previous terms of enlistment, or only such savings as have accrued during the term of enlistment within which the deposit is made.

The Paymaster-General of the Navy states in an indorsement on the letter accompanying your communication that—

"The practice of the service is to permit enlisted men to make deposit in any amount desired. There are numerous cases of large deposits, an instance being the deposit by one man of \$3,000 monthly for three consecutive months."

Manifestly, such a deposit could not be of savings of pay earned during any one period of enlistment.

The statute provides that the deposit may be made "with the paymaster upon whose books his account is borne."

But it does not in terms or by necessary implication limit the amounts which may be deposited to savings earned during any single period of time.

The statute was evidently enacted in the interest of a class of men whose improvidence and helplessness has long been recognized and the consequences of which have been guarded against by previous beneficent legislation.

It was intended to provide for this class a secure depository, of which they might voluntarily avail themselves, but subject always to the restrictions and conditions which the statute and the Navy Regulations imposed.

I am of opinion then, that in the case stated by you the paymaster of the U. S. S. *San Francisco* may receive from the chief boatswain's mate the sum of \$900 as a deposit under the provisions of the act referred to, provided the

Drawbacks—Imported Materials.

\$900 represents the "savings" earned by the petty officer as an enlisted man or petty officer in the United States Navy.

Very respectfully.

HOLMES CONRAD,
Solicitor-General.

Approved.

JUDSON HARMON.

The SECRETARY OF THE NAVY.

DRAWBACKS—IMPORTED MATERIALS.

The exportation of alcohol with the intention of its reimportation, in order to take advantage of the drawback privilege, is to be regarded as colorable only, the alcohol is forfeitable, the persons engaged in the transaction are punishable, and there is no right to drawback.

If, however, the exportation was genuine, and with intent to dispose of the alcohol abroad, so that upon its arrival there it is to be regarded as absorbed in the general mass of foreign commodities, the subsequent importation of the goods in such cases is proper.

Imported articles of domestic origin are to be regarded as "imported materials" within the meaning of section 22 of the act of August 28, 1894, chapter 349, when their prior importation was not merely colorable.

DEPARTMENT OF JUSTICE,
February 24, 1897.

SIR: I have the honor to acknowledge your communication of February 19, asking my opinion whether certain alcohol is entitled to a drawback under section 22 of the tariff act of August 28, 1894, chapter 394, which provides—

"That where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties."

I assume, from the fact that this question is asked me, that the case under consideration by you can be brought within the first proviso to this section:

"That when the articles exported are made in part from domestic materials the imported materials, or the parts of

Drawbacks—Imported Materials.

the articles made from such materials, shall so appear in the completed articles that the quantity or measure thereof may be ascertained."

You inform me that the alcohol was exported partly under section 3329 and partly under section 3330 of the Revised Statutes. In the former case it had paid internal taxes, but had received a drawback upon exportation. In the latter case it had paid no internal taxes. In either case certain duties are paid upon reimportation, according to somewhat awkward provisions of paragraph 387 and section 19 of the tariff law, which it is not necessary for present purposes to analyze.

Your question, in substance, is whether the alcohol is an imported material within the meaning of section 22.

Before discussing this it is necessary to consider whether the exportation was *bona fide* or merely colorable, with intent, by reimportation, to evade some restriction or obtain some advantage under our customs legislation. By section 3330 it is unlawful intentionally to reland, within the jurisdiction of the United States, spirits which have been shipped for exportation under the provisions above cited. This prohibition has very recently been construed by the circuit court of appeals for the second circuit to prohibit the exportation of spirits for the purpose of immediately reimporting the same and thereby evading some provision of the law. (*Flagler v. Kidd*, not yet reported.) This construction is in accordance with previous opinions of this Department (17 Opin., 579; 18 Opin., 331; see also 21 Opin., 23). If, therefore, this alcohol was exported with the intention to reimport the same for the purpose of taking advantage of the drawback privilege, the exportation is to be regarded as colorable only. The alcohol is forfeitable and the persons engaged in the transaction are punishable. In that case, of course, there is no right to drawback.

If, however, the exportation was genuine and with intent to dispose of the alcohol abroad, so that upon its arrival there it is to be regarded as absorbed in the general mass of foreign commodities, the opinions and decision cited are not applicable. The subsequent importation of the goods in such cases is proper. Whether the provisions of section 22

Civil Service—Transfer of Clerks.

are applicable to such goods is not entirely clear. The proviso to that section contrasts "imported materials" with "domestic materials," which would tend to exclude all materials of domestic origin from the former of the two classes. Moreover, section 9 of the same act contains a series of provisions with a view to the exportation, free of duties, of "all articles manufactured in whole or in part of imported materials or of materials subject to internal revenue tax." It may be argued with force that, as this section expressly applies to materials subject to internal revenue tax, it must have been the intent of Congress that all articles made for export out of such materials must be made in bonded warehouses according to its provisions. On the other hand, it is difficult to understand why articles made of imported materials should be given greater privileges than those made of domestic materials; nor is it apparent why any discrimination should be made among imported goods to the disadvantage of those which are of American origin.

On the whole, it is my opinion that imported articles of domestic origin are to be regarded as "imported materials," within the meaning of section 22 of the act of 1894, when their prior importation was not merely colorable within the principle of *Flager v. Kidd* and the opinions above cited.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF THE TREASURY.

CIVIL SERVICE—TRANSFER OF CLERKS.

The Civil Service Commission is not authorized to transfer a naval paymaster's clerk assigned to sea duty to a similar position in the Navy Department, as paymasters' clerks assigned to sea duty were not classified by the President's order of May 6, 1896, while such clerks performing similar services in offices on shore were classified by that order.

DEPARTMENT OF JUSTICE,

February 27, 1897.

SIR: I have the honor to acknowledge the receipt of your letter of the 25th instant, with inclosures, in which you request the opinion of the Attorney-General as to the power of the Civil Service Commission to authorize the transfer of

NAVAL OFFICER—ARREST.

Mason A. Posey, paymasters' clerk on the U. S. S. *Marblehead*, to a similar position in the Navy Department. It appears that paymasters' clerks assigned to sea duty were not classified by the President's order of May 6, 1896, while paymaster's clerks performing similar service in offices on shore were classified by that order.

Rule IV, section 2, of the civil-service rules promulgated by the President November 2, 1896, provides:

"No person shall be appointed to, or be employed in, any position which has been, or may hereafter be, classified under the civil-service act until he shall have passed the examination provided therefor, or unless he is especially exempt from examination by the provisions of said act or the rules made in pursuance thereof."

Rule X, section 5, provides:

"Transfer shall not be made from a position not classified under the civil-service act to a classified position." * * *

The facts that paymasters' clerks on sea duty are not classified, while paymasters' clerks on shore duty are classified; that it is desired to transfer Mr. Posey from the one duty to the other, and not from the position he holds to another involving a different character of employment, and that if the transfer can not be made a hardship will be imposed on such clerks assigned to sea duty, do not, in my opinion, justify a different conclusion. The only way by which such transfer can be made is by the classification of paymasters' clerks assigned to sea duty, or, if this is deemed impracticable or inexpedient, by an amendment of the rules so as to remove the hardship of such cases.

Respectfully,

HOLMES CONRAD,
Acting Attorney-General.

The SECRETARY OF THE NAVY.

NAVAL OFFICER—ARREST.

As adequate power is possessed by the Secretary of the Navy to cause the arrest of an officer for malappropriation of public funds, notwithstanding the fact that he has been arrested by the civil authorities for the same offense and discharged on bail, it is improper to cause his arrest by the civil officers in order to his trial before a naval court-martial.

Naval Officer—Arrest.

DEPARTMENT OF JUSTICE,

March 9, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of March 8, in which you recite a telegram from the commandant of the naval station, Newport, R. I., to the effect that Paymaster John Corwine, U. S. N., had been arrested and discharged on bail; and you request that "the United States attorney at Providence, R. I., be instructed to take such steps as may be necessary to secure, on behalf of this Department, the custody of Paymaster Corwine, in order that he may be brought to trial before a general court-martial for the offenses which he is alleged to have committed."

And you request my opinion as to "the propriety of placing Paymaster Corwine in arrest and confinement at the naval station, Newport, R. I., notwithstanding the fact that he is under bond."

On the case presented by you it is clear that Mr. Corwine is liable to indictment and prosecution in the courts of the United States for malappropriation of the public funds in his charge, and that he is liable to be proceeded against before a general naval court-martial for violation of the Naval Regulations.

But the methods of procedure in these two tribunals are wholly distinct from the initiation of the prosecution to final sentence, and the law does not contemplate or make provision for their being commingled at any stage.

The arrest of Mr. Corwine, at the instance of the United States attorney, could be made only upon a warrant setting forth the ground of complaint against him, issued by a civil officer and executed by a United States marshal. Such an arrest could be followed only by information, or indictment, and the proceedings consequent thereon, in a United States court.

Section 1624, Revised Statutes, prescribes the articles by which the Navy of the United States shall be governed.

Article 14 prescribes the punishment which may be imposed by a naval court-martial upon any person in the naval service who willfully misappropriates money of the United States.

Attorney-General.

Article 8, section 20, authorizes punishment for the officer violating the Naval Regulations; and

Articles 1040, 1041, and 1042 of the United States Naval Regulations provide for the arrest and confinement, under certain conditions, of officers charged with the commission of offenses.

Full power is given to the Secretary of the Navy to cause the arrest of any officer of the Navy charged with the commission of crime and have him brought before a naval court-martial for trial.

It would then, in my opinion, be unnecessary, and indeed improper, to cause the arrest of this naval officer by the civil officers of the Government in order to his trial before a naval court-martial while adequate power resides in the Secretary of the Navy to arrest and confine him and bring him before such court-martial for trial.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JOSEPH MCKENNA.

The SECRETARY OF THE NAVY.

ATTORNEY-GENERAL.

The Attorney-General is not permitted by statute to respond to a request for an opinion by the head of a Department which does not show what the facts are or that a case has presently arisen in the administration of the Department.

DEPARTMENT OF JUSTICE,
March 13, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of February 17, in which, after reciting section 1223, Revised Statutes, and section 2 of the act of Congress approved July 31, 1894 (28 Stat., 205), you request my opinion as to "whether or not the provision quoted from the latter act supersedes or modifies in any way the provisions of section 1223, Revised Statutes, as to retired officers of the Army holding or accepting appointments in the diplomatic or consular service of the Government."

It does not appear from your letter what the facts are or, indeed, that any case at all has presently arisen upon which

Office—Retired Officer.

my opinion is requested; but the inquiry submitted by you appears to present but a moot case, to which I am not permitted by statute or precedent to respond.

Section 356, Revised Statutes, provides:

“The head of any executive department may require the opinion of the Attorney-General on any question of law arising in the administration of his Department.”

“The Attorney-General will not give an opinion on an important legal question when it is not practically presented by an existing case before a Department.” (9 Opin., 421; 10 Opin., 50; 13 Opin., 531; 19 Opin., 332.)

“It must, I conceive, be deemed settled that the Attorney-General can only act upon a determinate statement of facts furnished by the officer asking his opinion.” (10 Opin., 267; 11 Opin., 189.)

Where an official opinion from the head of this Department is desired on questions of law arising on any case, the request should be accompanied with a statement of the material facts of the case, and also the precise questions on which advice is wanted. (14 Opin., 367-368; 20 Opin., 220; 20 Opin., 383.)

HOLMES CONRAD,
Solicitor-General.

Approved.

JOSEPH McKENNA.

The SECRETARY OF WAR.

OFFICE—RETIRED OFFICER.

The Secretary of the Navy is not precluded by section 2 of the act of July 31, 1894, from employing one N., retired, under the act of February 19, 1897, to supervise the completion of certain tables of planets. An act of Congress authorizing the expenditure of money for the employment of a competent mathematician to supervise the completion of certain tables of planets, providing no permanency to the term, no requirement that the person employed shall either take an official oath or receive a commission, and no formalities in the selection of such an employee, does not create an office.

The person to be employed may be designated either by order of the Secretary of the Navy or the head of the bureau having charge of the work to be done, which order need only designate the person selected as a competent mathematician and the compensation he is to receive.

Office—Retired Officer.

DEPARTMENT OF JUSTICE,

March 23, 1897.

SIR: I have the honor to acknowledge receipt of your favor of March 13, 1897, asking for an opinion as to whether you are prohibited by virtue of section 2 of the act of July 31, 1894, "making appropriations for the legislative, executive, and judicial expenses of the Government," from employing Prof. Simon Newcomb, retired, under the provisions of the act of February 19, 1897, "making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year 1898," which provides:

"For services of a competent mathematician to supervise the completion of the tables of the planets, two thousand five hundred dollars, to be immediately available."

It is my opinion that you are not so precluded. The statute authorizing the expenditure of the money clearly does not create an office or contemplate any of the formalities in the selection of such an employee as to distinguish his employment as an office. There is no permanency to the term, there is no requirement that the person employed shall either take an official oath or receive a commission.

Section 2 of the act of July 31, 1894, has received construction twice at the hands of the Comptroller of the Treasury, namely, in the cases of Reynolds (reported in 2 Decisions of the Comptroller, 271), and Fleming (*Id.*, 467), where the authorities bearing upon the essential elements distinguishing an office within the language of that statute from a mere employment are collated and dwelt upon. Certainly, the person to be employed under the provisions of the act of February 19, 1897, is more remote from the essential characteristics of an officer than were either of the employees mentioned by the Comptroller.

In my opinion, the manner of designating the person to be employed is immaterial, and may be either by an order of the Secretary of the Navy or of the head of the bureau having charge of the work to be done, which order need only designate the person selected as a competent mathematician and the compensation he is to receive.

Very respectfully,

JOSEPH McKENNA.

The SECRETARY OF THE NAVY.

Attorney-General.

ATTORNEY-GENERAL.

A request for an opinion of the Attorney-General must not relate to a mere moot question, but to one which requires immediate action, the answer to which is necessary for the protection of the officer making the inquiry or to insure the lawfulness of the action which he is about to take.

The question whether or not to commence a civil action or criminal prosecution must ordinarily be decided by some officer of the Department of Justice.

The Attorney-General is not authorized to give the head of another Department a legal opinion upon such a question.

DEPARTMENT OF JUSTICE,

March 25, 1897.

SIR: I have the honor to acknowledge your communication of March 15, relating to proposed judicial proceedings in relation to lands found to have been erroneously patented under the Western Pacific Railroad grant in California. The proceedings in contemplation are to be taken in conformity with the act of March 2, 1896, chapter 39.

You ask me whether any right of action remains in the United States, and, if so, upon what company demand should be made for the value of the land.

The opinion of the Attorney-General may be asked by the head of any other Executive Department "on any questions of law arising in the administration of his Department." (Rev. Stat., 356.) The inquiry must relate, not to a mere moot question, but to one which requires immediate action. The answer must be necessary for the protection of the officer making the inquiry or to insure the lawfulness of the action which he is about to take. The question whether or not to commence a civil action or criminal prosecution is one which must, ordinarily at least, be decided by some officer of the Department of Justice. If any other Department of the Government is informed of facts which seem to require such action to be taken, its duty is to communicate them, together with any suggestions which it desires to make, to the Department of Justice. The Attorney-General, therefore, is not authorized to give a legal opinion under these circumstances, but his duty is to consider the question (not always one of pure law) whether it is advisable to commence litigation. (See 20 Opin., 702, 714; 21 Opin., 6, 133, 369.)

Attorney-General—Retired Army Officer.

These reasons are sufficient to show that I am not permitted to give a legal opinion upon the first question asked by you. I would suggest that you communicate to me fully the facts as to each tract of land with relation to which no claim of *bona fide* ownership under the act of 1896 is pending and undecided. It will then be my duty to decide whether proceedings shall be instituted, and, if so, against whom demand should be made for the land.

Very respectfully,

JOSEPH McKENNA.

The SECRETARY OF THE INTERIOR.

ATTORNEY-GENERAL—RETIRED ARMY OFFICER.

The Attorney-General is not permitted to give an opinion as to the construction or interpretation of a statute except in an actual case which has arisen before one of the Executive Departments calling for its action in the regular course of its affairs.

The solution of the question whether an officer on the retired list of the Army can accept a diplomatic or consular appointment and still hold his position on the retired list with rank and pay is a matter of his private concern only, and not a subject with which the United States can be concerned until some action has been taken by such officer.

DEPARTMENT OF JUSTICE,

March 26, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of the 22d instant, inclosing a copy of a letter to the Adjutant-General of the Army, dated February 9, 1897, Lexington Union Club, Lexington, Ky., from T. J. Clay, first lieutenant, United States Army, retired, and a copy of General Orders, No. 3, Headquarters of the Army, of January 11, 1895.

You acknowledge the receipt of my communication to you of the 13th instant, in reply to an inquiry submitted by you to the Attorney-General "as to the construction of a provision of the act of July 31, 1894, respecting the eligibility of retired officers of the Army to hold certain offices," as to which inquiry I replied that it appeared to present but a moot case, to which I was not permitted by statute or precedent to respond.

Attorney-General—Retired Army Officer.

You now renew your request for my opinion, and state that—

“A construction of the law of July 31, 1894, referred to, is necessary to dispose of questions arising in the administration of the War Department;”

And conclude:

“The question as to whether or not the prohibition contained in section 1223, Revised Statutes, is set aside or repealed by section 2 of the act of July 31, 1894, is now submitted to the Department by Lieutenant Clay, a retired officer, a copy of whose letter is inclosed.”

I have to regret that a sense of official duty, enlightened by an unbroken line of decisions of my predecessors in office, founded upon a course of reasoning which I am unable to resist, but to which I heartily assent, forbids my compliance with your request.

My duty is clearly defined in section 356, Revised Statutes, which provides:

“The head of any executive department may request the opinion of the Attorney-General on any questions of law arising in the administration of his department,”

And section 357, which provides:

“Whenever a question of law arises in the administration of the Department of War, or the Department of the Navy, the cognizance of which is not given by statute to some other officer from whom the head of the Department may require advice, it shall be sent to the Attorney-General,” etc.

These sections have time and again received the construction of my predecessors, by which I am now guided.

They do not permit the Attorney-General to give an opinion as to the construction or interpretation of a statute except in an actual case which has arisen and is before one of the Executive Departments calling for its action in the regular course of administration of its affairs.

Attorney-General Black in 1857, when a like request was made to him by one of your predecessors, said (9 Opin., 82):

“It has always been the rule of this office to give advice only in actual cases where the special facts are set forth by the Department. It is impossible to reply to mere speculative points or supposed cases. The Attorney-General is not required to write abstract essays on any subject.

Attorney-General—Retired Army Officer.

“If there be a claim pending before you on which you desire to have my advice, and you will be pleased to say how it arises, what are the facts, and wherein the law seems doubtful, I shall with great pleasure give you my opinion.”

In 1891 Attorney-General Miller said (20 Opin., 250):

“My predecessors have frequently held that the opinion of the Attorney-General can not be given upon a general subject, but only on one or more specific questions of law based on a case stated.”

It may be, and doubtless is, a subject of reasonable interest, and perhaps of great anxiety, to officers of the United States Army on the retired list to ascertain “if an officer on the retired list of the Army can accept a diplomatic or consular appointment and still hold his position on the retired list with rank and pay.”

But, manifestly, the solution of that question by any retired officer of the Army, and the course of conduct which he may adopt in pursuance of such solution, is a matter of his private concern only, and not a subject with which the United States can be concerned until some action has been taken by such officer.

I am unable to perceive how the mere abstract question can arise in the administration of the War Department; and the opinion of the Attorney-General, if given in response to your inquiry, would be given when no case had actually arisen and when no case might ever arise.

If Lieutenant Clay, or any other retired officer, should be called upon to determine such question in his own case, the obvious course for him to pursue is that which is open to every person inclined to pursue a course as to the legal consequences of which he is in ignorance or doubt. He should seek the advice of private counsel, learned in the law, and obtain their opinion, for which, if given without due care, such counsel can be held to a personal accountability.

The whole matter, as it seems to me, is one strictly of private concern and in no sense of public interest.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JOSEPH MCKENNA.

The SECRETARY OF WAR.

Collisions at Sea—Navigation Laws.

COLLISIONS AT SEA—NAVIGATION LAWS.

The amendments to section 4233 of the Revised Statutes are special rules duly made by local authority according to the provisions of article 30 of the act of August 19, 1890, chapter 802.

Those portions of the act of 1890 which do not "interfere" with the operation of special rules duly made by local authority according to the provisions of article 30, as construed by the act of February 19, 1895, chapter 102, are rules for the guidance of American vessels, not only on the high seas, but also on "all waters connected therewith navigable by seagoing vessels."

DEPARTMENT OF JUSTICE,
March 31, 1897.

SIR: I have the honor to acknowledge your communications of March 29 and March 30, asking my opinion with relation to the rules of navigation.

The international regulations for preventing collisions at sea, prescribed by the act of August 19, 1890, chapter 802, will go into effect by Executive proclamation on July 1, 1897. These regulations, by the terms of the statute, "shall be followed by all public and private vessels of the United States upon the high seas and in all waters connected therewith navigable by seagoing vessels." Article 30, however, reads: "Nothing in these rules shall interfere with the operation of a special rule duly made by local authority relative to the navigation of any harbor, river, or inland waters." All laws inconsistent with the act of 1890 are repealed by section 2.

Acting probably upon suggestions of Attorney-General Olney (21 Opin., 106), Congress passed the act of February 19, 1895, chapter 102, which provided, among other things, that the provisions of section 4233 of the Revised Statutes "are hereby declared special rules duly made by local authority" within article 30 aforesaid. By the act of March 3, 1897, chapter 389, entitled "An act to amend the laws relating to navigation," Congress has in sections 12 and 13 amended section 4233.

You first ask whether the amendments to section 4233 are special rules duly made by local authority according to the provisions of article 30 of the act of 1890. This question I answer in the affirmative. You further ask whether those portions of the act of 1890, which do not "interfere" with

Bureau of American Republics—Penalty Envelopes.

the operation of special rules duly made by local authority, according to the provisions of article 30, as construed by the act of 1895, are rules for the guidance of American vessels, not only on the high seas, but also on "all waters connected therewith navigable by seagoing vessels," instancing the provisions of article 31 of the act of 1890. This question I also answer in the affirmative.

Very respectfully,

JOSEPH MCKENNA.

The SECRETARY OF THE TREASURY.

BUREAU OF AMERICAN REPUBLICS—PENALTY ENVELOPES.

The monthly bulletin published by the Bureau of American Republics, although it contains advertisements of private firms or corporations, is entitled to transmission through the mails free of postage under the act of February 20, 1897.

DEPARTMENT OF JUSTICE,

April 8, 1897.

SIR: I beg to acknowledge the receipt of your communication of the 2d instant, with the accompanying "correspondence" in reference to the use of the penalty envelope by the Bureau of American Republics for inclosing circulars soliciting advertisements to be inserted in the Bulletin issued by that Bureau and the mailing of the Bulletin containing private advertisements.

You ask me to advise you "if it (the Bulletin) should be transmitted in the mails when it contains advertisements of private firms or corporations, free of postage, under cover of the penalty envelope."

Secretary Olney in his communication of December 11, 1896, addressed to your predecessor, said:

"The Commercial Bureau of American Republics is the agent or representative of an association called 'The International Union of American Republics for the Prompt Collection and Distribution of Commercial Information.' The United States is a member of this international union—a union not effected by treaty, but by informal agreement sanctioned by the legislative and executive branches of the respective Governments.

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“Under the agreement the United States advances annually the amount of money necessary for the maintenance of the commercial bureau, which, by agreement is placed under the supervision of the Secretary of State of the United States, and by act of Congress (28 Stat., 419) is put under his direction and control.”

The act referred to provides:

“The Bureau of American Republics shall be placed under the control and direction of the Secretary of State, who shall report to Congress at its next regular session the propriety of continuing said Bureau, or, if any obligation exists upon the part of the United States requiring the continuance thereof.”

By act of February 26, 1896, it was provided:

“That any moneys received from sale of the Bureau publications, from rents, or other sources, shall be paid into the Treasury as a credit in addition to the appropriation, and may be drawn therefrom upon requisition of the Secretary of State for the purpose of meeting the expenses of the Bureau.”

It appears, then, that the Monthly Bulletin of the Bureau of American Republics is a publication authorized by the Government of the United States as a feature of the Bureau of American Republics, which is “under the control and direction of the Secretary of State;” that the expense of this publication is primarily borne by the United States alone; that the reimbursement of such expenses depends on the voluntary contributions from the other members of the International Union of American Republics, “from the sales of the Bureau publications, from rents, or other sources.”

By act of March 3, 1877, section 5 (19 Stat., 335), it was provided—

“That it shall be lawful to transmit through the mail, free of postage, any letters, packages, or other matters, relating exclusively to the business of the Government of the United States.”

The appropriation act for the diplomatic and consular service, approved February 20, 1897, provides:

“Commercial Bureau of American Republics, \$28,000.

Bureau of American Republics—Penalty Envelopes.

“Provided, That any money received from sale of the Bureau publications, from rents, or other sources, shall be paid into the Treasury as a credit in addition to the appropriation, and may be drawn therefrom upon requisitions of the Secretary of State for the purpose of meeting the expenses of the Bureau.

“Provided, That the provisions of the fifth and sixth sections of the act entitled ‘An act establishing post routes and for other purposes,’ approved March 3, 1877, for the transmission of official mail matter, be, and they are hereby extended and made applicable to all official mail matter of the Bureau of the American Republics established in Washington, by recommendation of the International American Conference representing the International Union of American Republics.”

It can hardly be doubted that among the “official mail matter” referred to in the act must be embraced the Monthly Bulletin of the Bureau of American Republics. This was the official organ, by means of which whatever beneficial results the Bureau produced were distributed among the members of the International Union. This was its sole organ of utterance. Without it, its labors would be as unprofitable as a watch without hands.

It appears from the “correspondence” which accompanies your letter that at the time of and long prior to the passage of the act approved February 20, 1897, this Monthly Bulletin contained advertisements of persons and corporations trading and doing business on private account; that these advertisements were solicited by the Director of the Bureau of American Republics, and were paid for by the persons for whom they were published.

It is not unreasonable to impute to Congress a reasonable degree of knowledge of the subject-matter upon which it was legislating. In extending the provisions of sections 5 and 6 of the act approved March 3, 1877, and making them applicable to all official matter of the Bureau of American Republics, it may be assumed that the mind of Congress was directed to the Monthly Bulletin as it then appeared. It was the only publication of the Bureau of American Republics, published, as we have seen, at the expense of the United

Chinese.

States, by a Bureau which was subject to the direction and control of the Secretary of State, the proceeds of the sale of which were to be paid into the Treasury of the United States, to be drawn therefrom only upon requisitions of the Secretary of State. It was recognized as "matter relating exclusively to the business of the Government of the United States" and for that reason was authorized to be transmitted through the mail free of postage, just as it was, covers, advertisements, contents, and all.

As an original question, it can hardly be doubted that the United States should not enter into competition with the private publications of the country for the advertisements of private enterprises; and as the Bureau of American Republics has been placed by Congress under the control and direction of the Secretary of State, it is entirely competent for the Secretary of State to prohibit the publication, in the Monthly Bulletin of the Bureau of American Republics, of such advertisements.

I am of opinion, therefore, that the fact that this Monthly Bulletin contains advertisements of private firms or corporations does not deprive the Bureau of American Republics of the privilege extended to it by the act approved February 20, 1897, of free postage for its official matter.

The "correspondence" accompanying your communication is herewith returned.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JOSEPH McKENNA.

The POSTMASTER-GENERAL.

CHINESE.

The number of Chinese to be admitted to this country as participants in the Tennessee Centennial Exposition may be limited by the Secretary of the Treasury.

DEPARTMENT OF JUSTICE,
April 19, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of the 17th instant, inclosing a telegram of

Dams Across the Rio Grande.

April 13, 1897, from A. M. Connor, collector, and an opinion given to you by the Solicitor of the Treasury. You state that—

“In view of statements which have been made to the Department of the probable arrival at Seattle, Wash., of 150 Chinese persons, and at San Francisco of from 200 to 300 Chinese persons, claiming to be participants in the Tennessee Centennial Exposition, and of the information contained in the telegrams hereinbefore referred to from the director-general of the said exposition”—

And you request an opinion from me—

“As to the authority of the Secretary of the Treasury to limit the number of Chinese to be admitted to this country as participants in the exposition mentioned,”

I have examined the joint resolution of May 18, 1896, and the inclosures submitted by you, and, upon full consideration of the whole matter, I beg to say that I concur in the conclusion reached by the Solicitor of the Treasury that the Secretary of the Treasury has complete authority to limit the number of Chinese to be admitted to this country as participants in the exposition to be held at Nashville, Tenn.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JOSEPH MCKENNA.

The SECRETARY OF THE TREASURY.

DAMS ACROSS THE RIO GRANDE.

The Secretary of the Interior had no power, under the act of March 3, 1891, providing for the location and selection of reservoir sites on the public lands of the United States and rights of way for irrigating ditches and canals, to grant a right to construct dams across the Rio Grande for the purpose of checking the flow of water and distributing it for irrigation purposes.

The control and supervision of the navigable waters of the United States is vested in the Secretary of War.

The remedy of the United States in case of the erection of a dam across navigable waters is by injunction, under section 10 of the act of September 19, 1890, and if the dam has been constructed, also by criminal prosecution.

Dams Across the Rio Grande.

DEPARTMENT OF JUSTICE,

April 24, 1897.

SIR: I have the honor to acknowledge the receipt of your letter of April 8 referring to a previous correspondence between the Mexican Minister at this capital and the Department of State with reference to the attempted construction by the Rio Grande Dam and Irrigation Company of dams across the Rio Grande River and to a request made by you February — for an opinion from this Department on the question submitted, and you “renew the request for an opinion on the question presented and invite attention to the pressing need of early action by your Department.”

I regret that compliance with your request for an opinion has been delayed by the resignation of officers of this Department since the request was received.

Your letter of February — was as follows:

“Under what purports to be authority for it to do so, granted in 1895 by the Secretary of the Interior under sections 18 to 21, pages 1101 and 1102, volume 26, Statutes at Large, *The Rio Grande Dam and Irrigation Company* claims the right to construct a dam across the Rio Grande River at Elephant Butte, in New Mexico, 125 miles above El Paso, and are about to do it.

“The Secretary of State has requested the Secretary of War to ‘adopt such measures as are most effective to open the river and to keep it open to such navigation as it is naturally capable of affording for commercial traffic between the States or between any portion of the United States and Mexico.’

“Permission to construct the dam has not been given by the Secretary of War, nor has he approved or authorized the same. The mouth of the Concho River (which empties into the Rio Grande) is 325 miles below the site of the proposed dam, and this river is the first material addition to the Rio Grande’s volume of water below that point. From the mouth of the Concho up to El Paso, a distance of 200 miles, the Rio Grande has been demonstrated to be a navigable water, and used as such in interstate commerce, and it has been recognized by Congress to be a navigable water

Dams Across the Rio Grande.

at El Paso. Above El Paso it does not appear to be used now for the purpose of navigation. But from El Paso to and including the site of the proposed dam, and a good many miles beyond that point, it has been used to float logs for commercial and business purposes, and in this part of the river it carries a slightly greater quantity of water than it does at El Paso and for 200 miles below El Paso, the volume of water being decreased on this part of the river by evaporation and agricultural uses. And also in this part of the river above El Paso, and including the site of the proposed dam, the conformation of the bed and banks of the river is such as to make navigation, by reason of the deeper and more confined channel, more feasible than at El Paso.

"The proposed dam is to be such a one as will check the flow of water in the river at Elephant Butte entirely for a great portion, if not all, of the year, and impound it, and also distribute it from that point for purposes of irrigation, so that the Rio Grande will be practically destroyed as a stream for many miles below Elephant Butte, and its volume of water so diminished as to materially affect its navigability throughout its entire course to the Gulf of Mexico.

"Your opinion is, therefore, requested as to whether, under the existing state of the law, there is any way for the United States authorities to prevent the construction of the said dam, and if so, what the remedy is."

As I understand, the only authority which the Secretary of the Interior possessed is claimed to have been conferred by sections 18 to 21 of the act of March 3, 1891, entitled "An act to repeal timber culture laws and for other purposes." The sections referred to—and section 17—provide only for the location and selection of reservoir sites on the public lands of the United States and rights of way for irrigating ditches and canals. There is nothing in the act or its purposes which was intended to affect the control or supervision of the navigable rivers of the country. That, by other and indeed later legislation, is put in the Secretary of War.

Section 10 of the river and harbor act approved September 19, 1890 (26 Stat., 454), is as follows:

"That the creation of any obstruction not affirmatively authorized by law to the navigable capacity of any waters

Dams Across the Rio Grande.

in respect to which the United States has jurisdiction is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks, and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense, and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. The creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States."

Section 7 of that approved July 13, 1892, is as follows:

"That section seven of the river and harbor act of September nineteenth, eighteen hundred and ninety, be amended and reenacted so as to read as follows:

"SEC. 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan

Dams Across the Rio Grande.

of such bridge or other works have been submitted to and approved by the Secretary of War or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War:

“Provided, That this section shall not apply to any bridge, bridge draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, drawbridge, bridge piers and abutments, or other works under an act of the legislature of any State over or in any stream, port, roadstead, haven, or harbor, or other navigable water not wholly within the limits of such State.”

These provisions are very definite, and the answer to your inquiry is obvious if the stream be a navigable one. This you assert, and I assume it.

You say:

“The proposed dam is to be such a one as will check the flow of water in the river at Elephant Butte entirely for a great portion, if not all, of the year and empound it; and also distribute it from that point for purposes of irrigation, so that the Rio Grande will be practically destroyed as a stream for many miles below Elephant Butte, and its volume of water so diminished as to materially affect its navigability throughout its entire course to the Gulf of Mexico.”

The purposes of the company do not seem to be ambiguous. In its prospectus (and, by the way, it is a foreign company, chartered by England) it proclaims its purposes to be—

“1. To create the largest artificial lake in the world.

“2. To obtain control of the entire flow of the Rio Grande in southern New Mexico, the only practical means of irrigating what is now considered the finest fruit and vine country in the United States, and, by controlling the water, to control to a great extent the irrigable lands.

“3. To compel the owners of irrigable lands in the valley of the Rio Grande to convey one-half of their lands to the company in return for water rights to the other half, and to

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pay in addition a perpetual water rent of one dollar and fifty cents per acre for every acre irrigated, or else to purchase water rights, at the ruling rate, from the company.

"4. To supply water to cities and towns for domestic and municipal purposes, and for milling and mechanical power, for which (they say) there is a large and constantly increasing demand."

The answer to your inquiry therefore is—

(1) That the Secretary of the Interior had no power, under the provisions of the act of March 3, 1891 (*supra*), to grant the rights claimed.

(2) That the remedy of the United States is by injunction under section 10 of the act of September 19, 1890 (*supra*); and if the dam has been constructed, also by criminal prosecution.

Upon being advised that the obstruction has been or is about to be erected, I shall at once order proper proceedings to be instituted by the United States district attorney under section 10 of the act approved September 19, 1890. (26 Stat., 454.)

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JOSEPH McKENNA.

The SECRETARY OF WAR.

BRIG GENERAL ARMSTRONG.

The claim of Samuel C. Reid, junior, against the United States, growing out of the destruction of the brig *General Armstrong*, fully considered and the conclusion expressed in the opinion of April 9, 1895 (21 Opin., 154), that said Reid was not entitled to the amount demanded. *Held* to be erroneous.

Under the act of March 2, 1895, the unexpended balance of the appropriation made to satisfy the claims growing out of the destruction of the brig *General Armstrong* should be used to reimburse S. C. Reid, junior, to the extent that the vouchers on file in the State Department show that he has made expenditures or disbursements on this account.

Brig General Armstrong.

DEPARTMENT OF JUSTICE,

April 28, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of the 17th instant, in response to my letter of the 7th, in which I expressed my willingness, for reasons stated therein, to review the opinion given by me April 9, 1895, as to the authority of the Secretary of State "to apply any part of the unexpended balance to the payment of the expenses and charges or to the reimbursement of Mr. Samuel C. Reid, junior, or anyone else who may have paid them," etc.

The reports of the Committees on the Judiciary of the Senate and House, respectively, on a bill introduced in the Fifty-fourth Congress for the relief of Samuel C. Reid, junior, induced me to make a thorough examination of all the papers on file in this Department, as well as of the report of the Court of Claims to the Thirty-fifth Congress, relating to this matter, and in the light of these to reexamine the grounds upon which the conclusions expressed in the opinion of April 9, 1895, to the Secretary of State rested, the result of which was a decided conviction that the conclusions there expressed were not responsive to the case submitted by the Secretary of State and did injustice to the rights of the parties concerned.

In that opinion I stated:

"It appears, however, that Samuel C. Reid, junior, now insists that the unexpended balance shall be applied to reimbursing him the amounts which have been paid to his assignees on the ground that such amounts were so expended by him in the expenses necessarily incurred in securing the appropriation.

"But the objection to this is obvious and twofold.

"First. The assignment of 12th of September, 1835, from the owners of the vessel to Captain Reid is subject to the express condition that he shall "bear all the expenses and charges and perform all necessary services for the collection of the demands hereafter mentioned.

"Second. That the act of Congress approved March 2, 1895, under which alone the Secretary of State has authority to disburse the unexpended balance, expressly provides that it 'shall be applied for the liquidation and settlement of the

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claims of Samuel C. Reid according to the vouchers now on file in said Department.’”

The view there expressed fails to recognize and to discriminate between two distinct and wholly dissimilar claims, growing out of the destruction of the brig *General Armstrong*, which have been asserted and prosecuted since 1815.

One was the claim prosecuted by Capt. Samuel C. Reid as the assignee and the attorney in fact for the owners and the officers and crew of the brig *General Armstrong* against the Kingdom of Portugal.

The other was the claim prosecuted by Samuel C. Reid, junior, on behalf of the owners and the officers and crew of said brig against the United States.

The assignment of September 12, 1835, referred to in said opinion related altogether to the claim which Captain Reid was prosecuting against the Kingdom of Portugal.

The act of Congress approved March 2, 1895, directing that the unexpended balance “shall be applied to the liquidation and settlement of the claims of Samuel C. Reid according to the vouchers now on file in said Department,” relates altogether to the claim which Samuel C. Reid, junior, had prosecuted against the United States.

A brief and succinct review of the principal features of the history of this matter as disclosed in the public records and in the files of this Department will serve to clearly demonstrate the difference between the two claims and to show that their confusion has resulted from a partial examination of the records and files, and has led to the error which should be repaired.

THE CLAIM AGAINST PORTUGAL.

The brig *General Armstrong* was destroyed by English men-of-war in the harbor of Fayal, within the dominions of the King of Portugal, with whom the United States were at peace; and a claim was believed to have accrued to the owners of the property destroyed against the Kingdom of Portugal.

From 1814 to 1840 the claims of the owners and of the officers and crew of the brig were prosecuted against Portugal, through Captain Reid, as their attorney in fact and on his own account.

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In 1835 the owners of the vessel assigned to Captain Reid all their right, title, and interest in the vessel and in the claim in consideration of his prosecuting the claim against Portugal at his own expense and charges.

In 1837 Mr. Kavanagh, our chargé at Lisbon, under instructions from this Government, demanded from Portugal satisfaction for said injury. From 1837 to 1844 it was a subject of correspondence between the two Governments.

In April, 1850, on demand being again made by the United States, Portugal offered to refer the matter to arbitration, and in July, 1850, renewed the proposition to that effect.

Under a treaty of 26th of February, 1851, between the two Governments, the matter was referred to the arbitramen, and award of Louis Napoleon, who, on 11th of December, 1852, published his award in favor of Portugal and against the United States.

This finally determined the claim which Capt. Samuel C. Reid was prosecuting, and with it fell all the assignments, powers of attorney, contracts, and conditions growing out of it.

THE CLAIM AGAINST THE UNITED STATES.

In January, 1854, the memorial of Samuel C. Reid, junior, "in behalf of the claimants in the case of the brig *General Armstrong*, praying indemnity," was presented to Congress and referred to the Committee on Foreign Relations of the Senate. It asked that \$131,600 be appropriated for the indemnity of the claimants.

This claim appears to have been referred by a resolution of the House of Representatives to the Court of Claims (Reports of Court of Claims, 1st sess. 35th Cong.).

In February, 1858, the Court of Claims reported adversely to the claimants.

In 1859 a bill for the relief of the claimants passed the Senate, but was lost in the House for want of a quorum.

Here the matter appears to have been suspended for nearly twenty years, when S. C. Reid, junior, renewed his efforts before Congress, which resulted in the passage of the act of May 1, 1882 (22 Stat., 697), by which the Secretary of State

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was authorized and directed "to examine and adjust the claims of the captain, owners, officers, and crew of the late private armed brig *General Armstrong*, growing out of the destruction of said brig by a British force in the neutral port of Fayal in September, 1814, upon the evidence established before the Court of Claims, and to settle the same upon principles of justice and equity, etc."

On June 15, 1883, Mr. Frelinghuysen, Secretary of State, in a letter to Attorney-General Brewster, recited the act of Congress of May 1, 1882, the assignment of September 12, 1835, by the owners of the vessel to Samuel C. Reid, his heirs and assigns, the assignment of 31st of October, 1851, by Samuel C. Reid to Samuel C. Reid, junior; and he showed that, under the authority vested in him by the act of Congress, he had ascertained the losses and apportioned the fund among the owners and officers and crew of the vessel. He decided that the assignment of the owners to Reid, senior, was, in effect, a power of attorney to collect the total sum upon a contingent fee of 50 per cent of the amount collected, he to pay all expenses, the balance to be paid over to the owners, their heirs or representatives, and that Samuel C. Reid, junior, stood in the shoes of his father in relation to this fund. He further decided that S. C. Reid, junior, under the assignments from his father, was entitled to receive, as attorney for the owners, one-half the amount awarded, and also the value of his father's share, less the 50 per cent received by him as attorney. He states that Mr. S. C. Reid, junior, claims "to be indemnified for the time, labor, and disbursements made as said attorney, agent, and assignee for the benefit of the claimants in the case," and he submitted to the Attorney-General, for his opinion, the question whether S. C. Reid, junior, was entitled to be so indemnified and reimbursed.

On July 7, 1883, Mr. Brewster, Attorney-General, gave his opinion, in which he denied the right of S. C. Reid, junior, but said: "The utmost that Reid, junior, can claim as to them is to be compensated out of their part of the fund, on the principle that no man shall enrich himself at the cost of another—the principle on which courts of equity proceed in

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charging a fund in which a number are interested, with a reasonable allowance to the counsel, for the energetic few who have produced the fund." (17 Opins., 590.)

On July 31, 1883, Mr. Brewster, on reconsideration, held that Captain Reid had no assignable interest in the fund, and that S. C. Reid, junior's, claim for reimbursement was covered by his former opinion.

On June 6, 1887, Mr. Bayard, Secretary of State, requested the opinion of the Attorney-General as to the claim of S. C. Reid, junior, to be reimbursed the amount of the expenses incurred by him in the prosecution of this claim.

Attorney-General Garland, in an opinion of June 9, 1887 (19 Opins., 32), held that this claim of Mr. Reid's "could not, for obvious reasons, be seriously entertained, much less adopted," but added, "if any good ground exists for reopening Mr. Frelinghuysen's adjudication of this question—and I express no opinion upon this subject—a claim by Mr. Reid, junior, for pro rata payment out of the balance in your hands, or any increase in the allowance to him, might be considered."

It is apparent that Mr. Frelinghuysen, in ascertaining the losses and in making distribution of the amount appropriated by Congress, did not advert to the fact that the claim for which Congress by that act made provision was not the claim which Capt. S. C. Reid had prosecuted under the assignments and contracts with the owners and officers and crew of the vessel. It was doubtless to this that Attorney-General Garland referred in declining to express any opinion as to whether good ground existed for reopening Mr. Frelinghuysen's adjudication.

It was after these persistent and oft-repeated demands by S. C. Reid, junior, for reimbursement of the amount expended by him in the prosecution of the claim against the United States, which had resulted after thirty years of labor in the appropriation by Congress in the act of May 1, 1882, after many opinions by Attorneys-General in response to inquiries from Secretaries of State, that Congress finally, on March 2, 1895, provided—

"That the unexpended balance of the appropriation made by the act of the 1st of May, 1882, * * * now under the

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control of the Department of State, shall be applied for the liquidation and settlement of the claim of Samuel O. Reid, according to the vouchers now on file in said Department."

"The claim of Samuel O. Reid" was the claim which, since 1883, he had with undaunted pertinacity been urging upon the Secretary of State, to wit, his reimbursement for the amounts expended by him in procuring the appropriation for the benefit of the owners, the officers, and crew of the lost vessel.

"The vouchers now on file in said Department" were the receipts which evidenced the amounts expended by S. O. Reid, junior, in obtaining such appropriation.

It is impossible, in the light afforded by the records and papers on file, to conceive that any other claim was referred to or provided for by the act of March 2, 1895. It was not the claim against Portugal that had been disposed of by the final award of Louis Napoleon; it was not the claim against the United States that had been provided for by the act of May 1, 1882. The only claim remaining was the claim recited by Mr. Frelinghuysen, Mr. Brewster, Mr. Bayard, Mr. Gresham, and Mr. Garland; that was the claim for reimbursement.

On April 3, 1895, Mr. Gresham, Secretary of State, in a letter to the Attorney-General, reciting the act of Congress of March 2, 1895, and referring to the ruling of Mr. Frelinghuysen, inclosed copies of correspondence between Mr. Reid, junior, and the State Department, and also copies of assignments by Mr. Reid and of receipts from the assignees to the State Department, and asked: "What amount, if any, I am required by the above-quoted extract from the act of March 2, 1895, to pay Mr. Reid out of the balance above referred to."

On April 9, 1895, an opinion was given by me, in response to this request, in which the history of this matter is to some extent reviewed, but in which the claim of S. C. Reid, junior, is treated throughout as but a continuation of the claim originally prosecuted by his father, Capt. S. C. Reid, and the conclusions reached in that opinion were in accordance with the conclusions stated in the opinions of former Attorneys-General prior to the act of March 2, 1895, that S. C. Reid, junior, was not entitled to the amount demanded.

Comptroller of the Treasury—Attorney-General.

I am satisfied that the conclusion then stated by me was erroneous, in failing to discern what was the real claim asserted by S. C. Reid, junior. This was not the fault of the letter in which the request of the Secretary of State was conveyed. It was the result, perhaps, of giving too partial attention to the case as stated in the former opinions.

I am of the opinion that the act of March 2, 1895, was an absolute appropriation of so much of "the unexpended balance in the hands of the Secretary of State" as might be required to reimburse S. C. Reid, junior, the amounts expended by him as far as such amounts were evidenced and could be ascertained from the vouchers on file in the State Department; and by such vouchers were meant the assignments and receipts, copies of which were exhibited in the letter of April 3, 1895, from Secretary Gresham.

The effect of the act of March 2, 1895, was to put an end to all questions as to the moral or legal rights of S. C. Reid, junior, to be reimbursed out of this fund. Congress, in the exercise of its unquestioned power, has by this act disposed of all such questions by directing that the fund shall be paid over to S. C. Reid, junior, to the extent that the vouchers on file in the State Department show he has made expenditures or disbursements on this account.

I am of opinion that the course of the Secretary of State is plain, and that the fund should be by him applied to the reimbursement of Mr. Reid as herein indicated.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JOSEPH MCKENNA.

The SECRETARY OF STATE.

COMPTROLLER OF THE TREASURY—ATTORNEY-GENERAL.

If a claim for pay is presented to the Treasury Department, the question of the legality of its payment is one exclusively for the Comptroller, whose decision thereon is final as to all executive officers.

On questions of disbursements of money and payment of claims which have been relegated by law to the Comptroller, the Attorney-General should not render opinions.

Navigable Waters of the United States.

DEPARTMENT OF JUSTICE,

May 6, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of May 4, requesting an opinion whether or not Samuel G. Fairchild is entitled to receive, in addition to the salary he has received as local inspector of hulls, pay as special inspector of foreign steam vessels, notwithstanding his waiver of claim therefor by accepting the additional appointment which, on its face, contained the statement "without additional compensation."

It seems to me that the question presented by your communication and the inclosed correspondence is not a proper one for an opinion.

First, the correspondence is quite ambiguous as to whether a claim is or is not presented. If no claim is presented, then no matter is pending in your Department as to which your action is called for.

If a claim is presented the question of the legality of payment is one exclusively for the Comptroller, whose decision thereon is, by statute, made final as to all executive officers. It has been repeatedly held by Attorneys-General that on questions of disbursement of money or payment of claims, so by law relegated to the Comptroller, the Attorney-General should not render opinions, especially in view of the fact that, if the matter is doubtful, it can be referred to the Court of Claims for authoritative decision. (Opinion of May 22, 1895, 21 Opin., 178; opinion of June 8, 1895, 21 Opin., 188.)

Very respectfully,

JOSEPH McKENNA.

The SECRETARY OF THE TREASURY.

NAVIGABLE WATERS OF THE UNITED STATES.

If a canal is one of the works provided for in section 7 of the act of July 13, 1892, making it unlawful, without the authority and permission of the Secretary of War, for anyone to build or construct any of the works therein mentioned in or over any of the navigable waters of the United States that would obstruct or impair the navigation of said waters, the Secretary of War has the authority to authorize and permit its construction.

Navigable Waters of the United States.

DEPARTMENT OF JUSTICE,

May 11, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of April 24, in which you state that—

“Application is made to the War Department by a private company known as the Port Arthur Channel and Dock Company to excavate a ship canal or channel from Sabine Pass to Port Arthur, in the State of Texas, a distance of about 8 miles. Sabine Pass has been improved at the expense of the Government to the extent of about \$3,000,000, and a very fine harbor, with 25 feet of water between the jetties, has thus been created. This harbor is made up by the distance between the jetties and a channel of perhaps six or seven miles long, upon the west bank of which is situated the town of Sabine Pass. The Port Arthur Company, however, controlling the Kansas City, Pittsburg and Gulf Railway, extending from Kansas City, Mo., to the town of Port Arthur, desires to construct a canal from Sabine Pass below the town across a neck of land on the southwesterly side of Sabine Lake for a distance, and thence along the shore of the lake, and in that way up to or near the town of Port Arthur.”

You request that I will, at the earliest possible date, give you my “opinion as to whether the Secretary of War has authority to permit the construction of this canal—of course under the direction of the Engineer of the Department.”

In complying with your request I will confine myself to an expression of opinion as to your legal power only. I express no opinion as to the expediency of its exercise in the case submitted, or as to its present or future consequences, or, in view of them, how it should be guarded.

Your authority to permit the construction of the proposed work is asserted under section 7 of the act of July 13, 1892 (27 Stats., 88), which is as follows:

“SEC. 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission

Navigable Waters of the United States.

of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters. * * *

"And it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works, over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge and other work have been submitted to and approved by the Secretary of War. * * *

"Or to excavate, or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War.

"*Provided*, That this section shall not apply to any bridge, bridge draw, bridge piers and abutments, the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, drawbridge, bridge piers and abutments, or other works, under any act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State."

I have distributed this section so as to make it apparent that it embraces three distinct classes of subjects, into one or more of which the present case must be brought.

The first clause refers to *structures*, such as wharves, piers, dams, breakwaters, jetties, etc.

The third clause refers to excavations or fills in the channel of any navigable waters of the United States.

The second clause refers to a distinct class of works constructed under the "act of the legislative assembly of any State." As to this class, it had been held in a long line of decisions of the Supreme Court, beginning with *Willson v. Blackbird Creek Marsh Company* (2 Pet., 245), that until Congress, in the exercise of its power to regulate commerce, had actually entered upon the improvement of the navigable waters within the territorial limits of a State it was competent for the State to adopt and execute such plan of improve-

CIVIL SERVICE.

ment as to those navigable waters as it might see proper. The effect of this clause being to provide that notwithstanding the adoption by a State of any plan of improvement as to its navigable waters, such plan should not be executed until it had been submitted to and approved by the Secretary of War.

The first and third clauses of the section were plainly intended to embrace all kinds of the work therein indicated that might be constructed in the navigable waters, whether structures of wood, stone, or iron, having their foundations in the soil beneath with superstructures above the surface of the water, or excavations or fills in the channel of such navigable water, which might alter or modify its course, location, condition, or capacity.

As to all such works, section 7 provides that they shall not be constructed—as to the one class, without the permission, and as to the other, without the approval and authority, of the Secretary of War.

The only question submitted to me, and which it is at all proper that I should answer, is “whether the Secretary of War has authority to permit the construction of this canal.”

Without assuming to decide whether or not a “canal” is one of the works provided for in section 7, I am of the opinion that if it is the Secretary of War has the authority under section 7 of the act of July 13, 1892, to authorize and permit its construction.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JOSEPH MCKENNA.

The SECRETARY OF WAR.

CIVIL SERVICE.

A person appointed to a position not in the classified service at the time of his appointment, but which was subsequently classified by the Executive order of May 6, 1896, was retained in the service absolutely and not subject to a probation of six months, is entitled to all the rights and benefits of persons of the same class or grade under the civil-service act, and may be transferred.

Civil Service.

DEPARTMENT OF JUSTICE,

May 19, 1897.

SIR: I have the honor to acknowledge receipt by reference from you of the communication of Messrs. Procter and Harlow, Civil Service Commissioners, and your request for my opinion on certain questions propounded by them.

The facts essential to the question are as follows:

Mr. William H. Michaels was appointed to a clerkship in the office of the Interstate Commerce Commission on April 28, 1896; took the oath of office on that day, and from thence was in actual service to the 15th of May, at which time he was furloughed without pay, but continued on the rolls.

The position was not a classified one at the time of his appointment, but was subsequently classified by the Executive order of May 6, 1896.

The Secretary of State requested the issuance of the necessary certificate by the Civil Service Commission for his transfer to the Department of State.

The commission raises a doubt of its legal ability to give the certificate, and attempts to sustain it by certain provisions of the Civil Service Rules and the fourth paragraph of section 2 of the civil-service act of January 16, 1883.

This paragraph is as follows:

"Fourth. That there shall be a period of probation before any absolute appointment or employment aforesaid."

Rule 2, section 7, of the rules provides that—

"A person holding a position on the date said position is classified under the civil-service act shall be entitled to all the rights and benefits possessed by persons of the same class or grade appointed upon examination under the provisions of said act."

Rule 8, section 3, provides that—

"A person selected for appointment shall be notified of his selection by the appointing or nominating officer, and upon his acceptance shall receive from the appointing officer a certificate of appointment for a probationary period of six months, at the end of which period, if the conduct and capacity of the probationer are satisfactory to the appointing officer, his retention in the service shall be equivalent to

Civil Service.

his absolute appointment; but if his conduct or capacity be not satisfactory, he shall be notified by the appointing officer that he will not receive absolute appointment because of such unsatisfactory conduct or want of capacity; and such notification shall discharge him from the service: *Provided*, That the probation of an employee in the Indian school service shall terminate at the end of the school year in which he is appointed: *And provided further*, That the time which an employee has actually served as substitute in parts of the service where substitutes are authorized shall be counted as part of the probationary period of his regular appointment; but that time served under a temporary appointment shall not be so counted."

Section 2 of rule 10 provides that—

"A person who has received absolute appointment may be transferred."

It is inferred from these provisions that a person holding a position on the date it is classified is subject to a probation of six months, or, in other words, has not an absolute appointment until the expiration of six months of actual employment, and until then can not be transferred. The inference is not justified, and proceeds from an incorrect interpretation of section 7 of rule 2. That section gives to "a person holding a position on the date said position is classified under the civil-service act" all the rights and benefits of persons of the same class or grade appointed under the civil-service act. The language is, the "rights and benefits." That is, "rights and benefits" after appointment—not burdens or conditions before appointment and limitations of it. Those in the service were retained in it, not probationally, but as approved; not conditionally, but absolutely. The rule accepted them, and if it had not intended it fully there would have been a careful discrimination as to service, and not an indistinguishable comprehension and putting on trial of those who may have been in the service for years with those of, maybe, a few months. A careful discrimination of persons by service might or might not have been wise, but, if intended, it would have been explicitly made and not left to a disputable interpretation. But the section is so plain of itself that confusion comes from inquiry to make it more

Erection of Catholic Chapel at West Point.

so, and I will conclude by saying that the Secretary of State's request for the transfer of Mr. Michaels is entirely legal.

Respectfully,

JOSEPH McKENNA.

The PRESIDENT.

ERECTION OF CATHOLIC CHAPEL AT WEST POINT.

Sections 161 and 217 of the Revised Statutes do not authorize the granting of licenses for the occupation of parts of military reservations for the erection of hotels, church edifices, etc.

Section 1331 has a special and partial purpose and gives no authority to dispose of the use of property.

From the act of July 5, 1884, it may be regarded as certain that it was the view of Congress that an explicit authority was necessary for even a transient occupation of a military reservation for other than its special purpose.

The act of July 28, 1892, authorizing the Secretary of War to lease such property of the United States under his control as may not for the time be required for the public use, forbids an occupation which contemplates permanency or duration longer than five years.

The Secretary of War has no power to accept a donation of property for the Government for use in perpetuity of Roman Catholics.

A revocable license, without limitation as to time, by the Secretary of War to a Roman Catholic archbishop, to erect and maintain a chapel on the military reservation at West Point, transcends the statute.

DEPARTMENT OF JUSTICE,

May 19, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of May 17, 1897.

You state that the Rev. C. G. O'Keefe petitioned Col. O. H. Ernst, Superintendent of the United States Military Academy at West Point for permission to erect a Roman Catholic chapel there for the use of the Roman Catholic cadets, etc. The petition you inclose.

You further state that on the 3d of March of this year Secretary of War Lamont issued to the Right Rev. M. A. Corrigan, Roman Catholic archbishop of the archdiocese of New York, a revocable license to erect and maintain a chapel on the military reservation at West Point and that said license was on the 2d of April revoked by you and a new license granted in its place. The licenses you inclose.

Erection of Catholic Chapel at West Point.

A question being raised as to the legality of this action, you ask "whether granting licenses of this character is or is not legal."

I reply as follows:

West Point is Government property, and hence conveyances of it or uses of it can only be authorized by Congress. Has Congress so authorized? The only direct provision as to it is section 1331, which reads as follows:

"The supervision and charge of the Academy shall be in the War Department, under such officer or officers as the Secretary of War may assign to that duty."

This section has a special and partial purpose and gives no authority to dispose of the use of property.

There are other provisions more general, and in a report made to Congress by the Secretary of War there is an enumeration of cases in which there were granted licenses for the occupation (of more or less duration) of parts of other military reservations. Some of these cases were of trifling moment, but others were important. Hotels were authorized and the erection of church edifices for particular denominations. Of the latter one was to the Episcopalians at Governors Island, New York; one to the Catholics at Fort Leavenworth, Kans., and one also at Fortress Monroe to the same denomination.

The privileges were denominated revocable licenses and came to be based on sections 161 and 217 of the Revised Statutes.

The sections are as follows:

"SEC. 161. The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

"SEC. 217. The Secretary of War shall have the custody and charge of all the books, records, papers, furniture, fixtures, and other property appertaining to the Department."

It is manifest that they do not authorize the practice exercised.

Erection of Catholic Chapel at West Point.

On July 5, 1884, Congress passed an act of which section 6 is as follows:

"The Secretary of War shall have the authority, in his discretion, to permit the extension of State, county, and Territorial roads across military reservations, to permit the landing of ferries, the erection of bridges thereon, and permit cattle, sheep, or other stock animals to be driven across such reservation whenever in his judgment the same can be done without injury to the reservation or inconvenience to the military forces stationed thereon."

This section is special and needs no comment except that at least part of it was unnecessary if the practice of the War Department was legal. To permit the temporary trespass of passing cattle was surely within a power which could grant a license to build a church or a hotel. It therefore may be regarded as certain that it was the view of Congress that an explicit authority was necessary for even a transient occupation of a military reservation for other than its special purpose, and it was natural when more durable interests were authorized by the act of July 28, 1892, they were precisely guarded and limited.

The act of July 28 is as follows:

"That authority be, and is hereby, given to the Secretary of War, when in his discretion it will be for the public good, to lease, for a period not exceeding five years and revocable at any time, such property of the United States under his control as may not for the time be required for public use and for the leasing of which there is no authority under existing law, and such leases shall be reported annually to Congress: *Provided*, That nothing in this act contained shall be held to apply to mineral or phosphate lands."

It is not necessary to determine the character of estate which can be created under this section, whether one strictly at will and revocable by both parties or whether in the nature of an estate upon condition. It seems certain that permanence of right is forbidden by it, and hence it would seem that an occupation which contemplates permanency or contemplates duration longer than five years is forbidden by it. A church edifice would seem to contemplate such occupation. In the instance case the character of structure

Erection of Catholic Chapel at West Point.

which is desired to be erected certainly does. As a structure—with integrity preserved—it can not be removed upon revocation or at the end of the term.

It is proposed that the church shall be the property of the Government. The reverend gentleman who makes the offer says:

“If this permission be granted, I propose to build a neat stone chapel to cost about \$20,000; the money to be provided by me and the plans of the building to be submitted to the superintendent of the Military Academy for his approval or modification. On its completion, the chapel will be handed over to the United States Government for use in perpetuity of the Roman Catholics who may reside at West Point.”

This condition can not be complied with. It is very clear that the Secretary of War has no power to accept a donation of property for the Government, certainly not to accept it with the limitation proposed—its use in perpetuity to Roman Catholics.

The action of Mr. Secretary Lamont did not respond to the offer—maybe excludes it. Nevertheless, there are serious objections to it. It gives, not a lease having a specified duration, but a license without limitation of time.

It is provided by the license that “the chapel will be erected and maintained at the cost of the licensee and his successors, and used for the religious worship of the Roman Catholics at West Point. During construction and thereafter the chapel shall be in the local custody of Rev. C. G. O’Keefe, rector, and his successors, under the general military control and supervision of the superintendent of the United States Military Academy. The site for the chapel and its dimensions will be designated by the superintendent, and before any work of building construction is commenced the plans and specifications of the structure will be submitted to and receive his approval, and he will also assure himself that funds adequate to the completion of the chapel are available. In case of revocation of this license, the building will be removed within sixty days, and any sum which may have to be expended in putting any premises or property hereby authorized to be occupied or used in as good condition for use by the United States as it is at this date shall

Duties—Feathers.

be repaid by said the Right Rev. M. A. Corrigan or his successors, archbishops of the archdiocese of New York, on demand."

By order of April 2, 1897, the license was revoked and another granted by you which has the same general provisions, but specifically requires the chapel to be of stone and of dimensions indicated upon a blue-print plan attached to the license and made a part of it. By this the dimensions of the chapel will be 37 feet wide in its narrowest part; 58 feet at its widest part, with a length of over 75 feet. It is to be removed within six months after notice of revocation.

That these licenses transcend the statute is plain. The statute provides for a definite term, with a power of even revoking that. The licenses provide for no term, and really commit the Government to a practical perpetuity. It would be idle to deny this—idle to deny that you do not expect to exercise, nor is it expected that you will exercise, the power of revocation except in emergency. Indeed a contention, not without some authority, could be raised that you could not. (*Veghte v. Rantan*, 19 N. J., 142; *Williamson, etc., R. R. v. Battle*, 68 N. C., 546.) At any rate the Government would find itself embarrassed either to endure a perpetuity of right in the license or exercise an invidious power.

The license should therefore be revoked and the petitioner remitted to Congress.

Very respectfully,

JOSEPH McKENNA.

The SECRETARY OF WAR.

DUTIES—FEATHERS.

An importation of bird of paradise feathers, being composed of natural feathers which are neither dressed, colored, nor manufactured, is not within paragraph 328 of the tariff act of August 28, 1894.

If a special meaning has been attached to certain words in a prior tariff act, it is presumed that Congress intended that they should have the same signification when used in a subsequent act in relation to the same subject-matter.

A sure method of interpreting a provision in a tariff law is by its past history.

Duties—Feathers.

DEPARTMENT OF JUSTICE,

June 7, 1897.

SIR: I have the honor to acknowledge your communication of June 4, asking my opinion as to the dutiable classification of certain bird of paradise feathers, which have been classified by the collector as ornamental feathers suitable for millinery use under paragraph 328 of the tariff act of August 28, 1894, which is as follows:

“Feathers and downs of all kinds, when dressed, colored, or manufactured, including quilts of down and other manufactures of down, and also including dressed and finished birds suitable for millinery ornaments, and artificial and ornamental feathers, fruits, grains, leaves, flowers, and stems, or parts thereof, of whatever material composed, suitable for millinery use, not specially provided for in this act, thirty-five per centum ad valorem.”

You do not submit to me any statement of the precise condition of these feathers, or any specific question of law, but ask in general my opinion as to the proper construction of the paragraph. Under these circumstances a long line of precedents would justify my returning the papers for revision.

If, however, I am to understand from your letter that these feathers, taken from the bird of paradise, have been neither dressed, colored, nor manufactured, enough information is given me to dispose of the present case. The language of the paragraph in question and of the corresponding paragraphs in immediately prior tariff acts is somewhat obscure; but a satisfactory interpretation may be reached by tracing the language back to the act of June 30, 1864, chapter 171. By section 11 of that act a rate of duty was provided for “ostrich, vulture, cock, and other ornamental feathers, crude or not dressed, colored or manufactured,” and a higher rate for such feathers “when dressed, colored, or manufactured.” Section 12 provided separately for “artificial and ornamental feathers and flowers, or parts thereof, of whatever material composed, not otherwise provided for.” Clearly section 11 covered all natural ornamental feathers, while section 12 was intended only for artificial feathers; the phrase “artificial and ornamental” in the latter section being

Tax on Passengers.

construed as if the conjunction "and" had been omitted. But "if a special meaning were attached to certain words in a prior tariff act," there is a presumption of some force "that Congress intended that they should have the same signification when used in a subsequent act in relation to the same subject-matter." (*Maddock v. Magone*, 152 U. S., 368, 371-372.) I find no sufficient evidence to rebut this presumption in the present instance.

I think, therefore, that paragraph 328 of the present act (which really contains two independent categories, the former ending with the words "millinery ornaments") should be read as if the word "and" were omitted after the word "artificial."

Hence the importation under consideration, being composed of natural feathers which are neither dressed, colored, nor manufactured, is not within it.

In construing the phrase "artificial and ornamental" I do not base my ruling upon any analogy drawn from the provision concerning "embroidered and hemstitched handkerchiefs." It is sufficient to dispose of the present paragraph by its past history, which is one of the surest methods of interpretation in dealing with our complicated tariff laws.

Very respectfully,

JOSEPH McKENNA.

The SECRETARY OF THE TREASURY.

TAX ON PASSENGERS.

The passengers on whom the tax provided by the acts of August 3, 1882, and August 18, 1894, is imposed, are those who make the United States their place of destination, and not those who touch at our ports en route to some other country.

DEPARTMENT OF JUSTICE,

June 15, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of June 8, transmitting a copy of a letter of 19th of May, from the collector of customs at San Francisco, "relative to an application by the Occidental and Oriental Steamship Company for a refund of certain per capita tax paid by said company on 35 Japanese passengers who arrived at San Francisco per steamer *Gaelic*, April 10, 1897."

Tax on Passengers.

It appears from your letter and the letters accompanying it that these Japanese passengers bought their tickets at Yokohama, in Japan, for transportation from that point to San Benito, Mexico. That they arrived in San Francisco en route and were there transferred, under the supervision and direction of the officers of the United States Customs Service, to the steamship *City of Para*, to be transported to San Benito.

You ask for my opinion "whether the tax accrued on the 35 Japanese passengers arriving per *Gaelic*, as mentioned above."

The act of August 3, 1882, entitled "An act to regulate immigration," provides:

"That there shall be levied, collected, and paid a duty of fifty cents for each and every passenger, not a citizen of the United States, who shall come by steam or sail vessel from a foreign port to any port within the United States."

It further provides that this duty shall be paid "within twenty-four hours after the entry thereof into such port;" and still further, that the money thus collected "shall be paid into the United States Treasury and shall constitute a fund to be called the immigrant fund."

By act of August 18, 1894 (28 Stat., 372), this head money duty was increased from 50 cents to \$1.

From the whole course of legislation on this subject, as well as from the expressions of opinion of the judges in the cases which have come before the Supreme Court, it is quite plain that the passengers on whom the capitation tax is laid are those who make the United States their place of destination and not those who merely touch at our ports en route to some other country.

In *Henderson et al. v. The Mayor of New York* (92 U. S., 274) the main question was as to the right of the State of New York to impose such a duty. But Mr. Justice Miller, in delivering the opinion of the court, has defined the nature of this tax:

"It is, as we have already said, in effect a tax on the passenger which he pays for the right to make the voyage—a voyage only completed when he lands on the American shore."

District of Columbia—Parks and Reservations.

The landing is not a casual, transient halt—a mere coming ashore while the vessel is in port delivering or receiving passengers and freight—but a final and permanent landing, so far as that voyage is concerned, at a port within the United States which was the “desired haven” which the passenger set out to reach.

I have no doubt that the 35 Japanese passengers were not such as within the meaning and intent of the statute the \$1 head tax could be levied for, and as to them it should not be exacted.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JOSEPH MCKENNA.

The SECRETARY OF THE TREASURY.

DISTRICT OF COLUMBIA—PARKS AND RESERVATIONS.

Under the act of March 3, 1897, making appropriations for the District of Columbia, the laying of conduits or erection of overhead wires for electric lighting in any park or reservation for the purpose of lighting the park or reservation is prohibited.

DEPARTMENT OF JUSTICE,

June 16, 1897.

SIR: I have the honor to acknowledge the receipt of the letter of Colonel Bingham, of June 2, 1897, to Gen. John M. Wilson, Chief of Engineers, U. S. A., with the indorsements thereon of the Acting Chief of Engineers and of the Acting Secretary of War, in which my opinion is requested “as to whether either the Commissioners of the District of Columbia or the officer in charge of public buildings and grounds, under the terms of the act approved March 3, 1897, making appropriations for the government of the District of Columbia, can authorize the laying of conduits or erection of overhead wires, for electric lighting purposes, in any park or reservation for the purpose of lighting the park or reservation.”

By act approved March 3, 1897 (29 Stat., 673), it was provided:

“Until Congress shall provide for a conduit system, it shall be unlawful to lay conduits, or erect overhead wires for elec-

Opening of Bids.

tric lighting purposes, in any road, street, avenue, highway, park or reservation, except as hereafter specifically authorized by law. *Provided*, however, that the Commissioners of the District of Columbia are hereby authorized to issue permits for house connections with conduits and overhead wires now existing adjacent to the premises with which such connection is to be made, and also permits for public lighting connections with conduits already in the portions of the street proposed to be lighted; * * * nor to prevent the United States Electric Lighting Company from extending its conduits into Columbia Heights and Mount Pleasant within the fire limits, as specifically provided in the act of June 11, 1896, making appropriations for the expenses of the government of the District of Columbia."

I am of opinion that under this act, the laying of conduits, or erection of overhead wires, for electric lighting purposes, in any park or reservation for the purpose of lighting the park or reservation is prohibited.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JOSEPH MCKENNA.
The SECRETARY OF WAR.

OPENING OF BIDS.

There is nothing in the acts of January 27 and April 21, 1894, amending section 3709 of the Revised Statutes, inconsistent with the legal right of the board of award of the Department of Agriculture to consider any bid received by them through the mail after the hour of 2 o'clock p. m.

The designation of 2 o'clock p. m. "for the opening of all such proposals in each Department" means only that such proposals shall not be opened *before* 2 o'clock p. m.

A proposal received after that hour, under circumstances which warranted the belief that it had been prepared and submitted in the light of the proposals submitted by other bidders, which had been already opened and made known, should not be received or entertained; but a proposal received under conditions which precluded the possibility of such unfairness should not be rejected because it happens to be received by the board of award a few minutes after 2 o'clock p. m.

Opening of Bids.

DEPARTMENT OF JUSTICE,

June 16, 1897.

SIR: I have the honor to acknowledge the receipt of your letters of May 17 and May 21, 1897, inclosing a letter of W. B. Dodson, postmaster at Akron, Ohio.

Referring to the act approved January 27, 1894, amending section 3709, Revised Statutes, you ask—

“In view of the above, if the board of award of this Department, appointed for the purpose of opening and considering bids under section 3709, has the legal right to consider any bid received by them through the mail after the hour of 2 o'clock p. m.”

The act of January 27, 1894 (28 Stat., 33), providing for advertisements for proposals for supplies for the Executive Departments of the Government, provides that they—

“Shall continue to be advertised for and purchased as now provided by law, on the same days and shall each designate 2 o'clock postmeridian of such days for the opening of all such proposals in each department and other Government establishment in the city of Washington.

“And the Secretary of the Treasury shall designate the day or days in each year for the opening of such proposals and give due notice thereof to the other departments and Government establishments.”

Your letters do not disclose the kind of supplies for which bids were invited, and I venture to call your attention to the subsequent act of April 21, 1894 (28 Stat., 58), in which the act of January 27, 1894, is amended in very important particulars.

I find nothing in the legislation referred to which is inconsistent with the legal right of the board of award of the Department of Agriculture to consider any bid received by them through the mail after the hour of 2 o'clock p. m.

The designation of 2 o'clock p. m. “for the opening of all such proposals in each department” means only that such proposals shall not be opened *before* 2 o'clock p. m. Certainly cases may and doubtless frequently do occur where the number of bids or proposals is so great as to occupy many minutes and perhaps hours in opening and considering them. All can not be opened exactly at 2 o'clock.

Opening of Bids.

The fact that one bid may arrive by mail after 2 o'clock p. m. and reach the hands of the board of award before they have opened all the bids which were received before 2 o'clock p. m. can hardly be accepted as sufficient ground for discarding altogether the belated bid; and especially, as in the present case, where it appears from the letter of the postmaster that "the special delivery package mailed by 'Werner Company' at Akron, Ohio, should by due course of mail have reached Washington at 1.25 p. m."

The object of the statute is to secure fairness and impartiality in awarding Government contracts; and where proper notice has been given by advertisement and the time and the place for opening such proposals designated and published, one submitting his bid or proposal and forwarding the same by due course of mail, by which it should have been delivered before 2 o'clock p. m., should not be deprived of his right to participate in the competitive bidding because his letter containing his bid did not reach the board of award until a few minutes after 2 p. m.

The statute should receive a reasonable construction and one in consonance with its manifest object and intent.

The interests of the Government are best secured by the larger number of competitive bids from which selection may be made.

By designating a certain hour on a fixed day "for the opening of all such proposals," both the Government and the bidders have secured to them the advantage of a prescribed moment prior to which no bids can be opened.

The statute does not say that all proposals must be *received* prior to 2 o'clock p. m., but it designates that hour for the opening of the proposals.

To be sure, a proposal received after that hour, under circumstances which warranted the belief that it had been prepared and submitted in the light of the proposals submitted by other bidders, which had been already opened and made known, should not be received or entertained; but a proposal received under conditions which precluded the possibility of such unfairness should not be rejected because it

Remission of Penalties.

happens to be received by the board of award a few minutes after 2 o'clock p. m.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JOSEPH MCKENNA.

The SECRETARY OF AGRICULTURE.

REMISSION OF PENALTIES.

The Secretary of the Treasury has not the right, in case of an application for a remission of penalty under section 17 of the act of June 22, 1874, to prosecute a further inquiry into the facts after the United States commissioner has reported his findings in the case under section 18 of said act.

DEPARTMENT OF JUSTICE,
June 22, 1897.

SIR: I beg to acknowledge the receipt of your communication of May 17, inclosing a copy of a letter from you to the Solicitor of the Treasury, and his reply thereto, conveying his opinion upon the question submitted to him in your letter and a written brief from Messrs. Curie, Smith & Mackie, attorneys for petitioners.

You submit for my opinion the question whether the Secretary of the Treasury, in case of an application for remission of penalty under section 17 of the act of June 22, 1874, has the right, after the United States commissioner has reported his findings in the case under section 18 of said act, "to prosecute a further inquiry into the facts."

Section 17 provides that the person seeking remission of the penalty—

* * * "Shall present his petition to the judge of the district in which the alleged violation occurred, or in which the property is situated, setting forth truly and particularly the facts and circumstances of the case and praying for relief, such judge shall, if the case in his judgment requires, proceed to inquire in a summary manner into the circumstances of the case at such reasonable time as may be fixed by him for that purpose, of which the district attorney and the collector shall be notified by the petitioner in order that they may attend and show cause why the petition should be refused.

Remission of Penalties.

"SEC. 18. That the summary investigation hereby provided for may be held before the judge to whom the petition is presented, or, if he shall so direct, before any United States commissioner for such district, and the facts appearing thereon shall be stated and annexed to the petition, and, together with a certified copy of the evidence, transmitted to the Secretary of the Treasury, who shall thereupon have power to mitigate or remit such fine, penalty, or forfeiture, or remove such disability, or any part thereof, if in his opinion the same shall have been incurred without willful negligence or any intention of fraud in the person or persons incurring the same, and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued upon such terms or conditions as he may deem reasonable and just."

Under these two sections the judge or commissioner is invested with the power and charged with the duty of ascertaining the facts of the case presented in the petition and of stating the facts so ascertained, and of transmitting such statement, together with the petition and a certified copy of the evidence, to the Secretary of the Treasury, "who shall thereupon have power to mitigate or remit," etc.

Plainly the responsibility is not laid upon the Secretary of the Treasury of ascertaining the facts; but upon the case stated in the petition and upon the statement of the facts ascertained by the judge or commissioner and upon the certified copy of the evidence, the Secretary of the Treasury must form his opinion; and if in his opinion the penalty has been incurred "without willful negligence or any intention of fraud," he may direct the prosecution to be discontinued upon such terms as to him may seem proper.

Nowhere in the letter or reason of the statute does it appear to have been contemplated that after the judge or commissioner has conducted his investigation *inter partes* that the Secretary of the Treasury should have the power by an *ex parte* and secret investigation to supplement the facts already ascertained.

It was the opinion of Attorney-General Harmon (21 Opin., 289) that in the case presented to him by your predecessor in office it was within the discretion of the Secretary "in

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remission proceedings under the antimoietty act of June 22, 1874, chapter 391, sections 17 and 18, to return the findings to the United States commissioner for a further hearing before him upon a claim of newly discovered evidence."

I am of the opinion that you have not the right, in case of an application for a remission of penalty under section 17 of the act of June 22, 1874, to prosecute a further inquiry into the facts after the United States commissioner has reported his findings in the case under section 18 of said act.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JOSEPH McKENNA.

The SECRETARY OF THE TREASURY.

REVENUE-CUTTER SERVICE.

The provision of the act of June 4, 1897, "that any chief engineer of the Revenue-Cutter Service who has held the office of engineer in chief shall hereafter receive the pay and emoluments of a captain of said service, and shall be eligible for appointment to the office of captain of engineers in said service, with the pay and emoluments of such captain," creates the office of captain of engineers; the pay is that of a captain of the revenue service, and the appointment is to be made from the chief engineers who have held the office of engineer in chief, and by the President, by and with the advice and consent of the Senate. The word "such" ordinarily refers to the next immediate antecedent, but not necessarily; never when the purpose of the section in which it is used would thereby be impaired.

DEPARTMENT OF JUSTICE,
June 25, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of June 14, in which you recite from the act approved June 4, 1897, making appropriations for sundry civil expenses for the Government for the fiscal year ending June 30, 1898, and for other purposes, the following provision:

"Provided, That any chief engineer of the Revenue-Cutter Service who has held the office of engineer in chief shall

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hereafter receive the pay and emoluments of a captain of said service, and shall be eligible for appointment to the office of captain of engineers in said service, with the pay and emoluments of such captain."

You request my opinion on the following points:

"1. As there is not now and never has been any such 'grade' or 'title' as 'captain of engineers' in the revenue service, and as a consequence no salary for such 'captain of engineers' has been fixed by law, does the provision cited create the office of 'captain of engineers?'"

"2. If the grade of 'captain of engineers' is created by the provision cited, and it is filled by appointment, what would be the 'pay and emoluments' of such 'captain of engineers?'"

You transmit with your letter a copy of an opinion of the Solicitor of the Treasury.

The legislation on the subject of the Revenue-Cutter Service which preceded the provision, the interpretation of which is solicited, is as follows:

"SEC. 2749, R. S. The officers for each revenue vessel shall be one captain and one first, one second, and one third lieutenant, and for each steam vessel, in addition, one engineer and one assistant engineer, etc.

"SEC. 2750. The grades of engineers shall be chief engineer and first and second assistant engineer, with the pay and relative rank of first, second, and third lieutenant respectively.

"SEC. 2751. The commissioned officers of the Revenue-Cutter Service shall be appointed by the President, by and with the advice and consent of the Senate.

"SEC. 2752. No person shall be appointed to the office of captain, first, second, or third lieutenant of any revenue cutter who does not adduce competent proof of proficiency and skill in navigation and seamanship.

"SEC. 2753. The compensation of the officers of the Revenue-Cutter Service shall be at the following rates while on duty:

"Captains, twenty-five hundred dollars a year each.

"First lieutenants and chief engineers, eighteen hundred dollars a year each."

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By act of July 31, 1894 (28 Stat., 172), it is provided—

“That the Secretary of the Treasury shall detail a captain of the Revenue-Cutter Service, who shall be chief of the division of Revenue-Cutter Service; and a chief engineer, who shall be engineer in chief of said service; but no additional pay or emoluments shall be allowed on account of such detail.”

By the appropriation act of May 28, 1896 (29 Stat., 149), it is provided—

“That the chief engineer of the Revenue-Cutter Service detailed as engineer in chief of said service under the provisions of the legislative appropriation act of July 31, 1894, shall hereafter receive the duty pay and have the relative rank of a captain of the Revenue-Cutter Service.”

This was the state of legislation when the provision of June 30, 1898, was enacted, and which I repeat here for convenient connection:

“*Provided*, That any chief engineer of the Revenue-Cutter Service who has held the office of engineer in chief shall hereafter receive the pay and emoluments of a captain of said service, and shall be eligible for appointment to the office of captain of engineers in said service with the pay and emoluments of such captain.”

This provision is certainly not clear, but it may be assumed that it was intended to be an addition to then existing law, and I think, notwithstanding its obscurity, the intention of Congress may be discerned.

It will be observed that rank by detail and the pay thereof had been provided for by previous legislation. Fixity of rank was evidently intended to be made by the new provision. A new grade was therefore to be created, and (as accessory to it) the pay of it and a class of officers eligible to it were to be provided. In providing for these, confusion of expression occurred, but keeping to intention it is easily resolvable by the application of well-known rules of interpretation.

The legislation was to have a present operation. It could not have unless it created a new grade—an eligible class and pay were but accessories to that, as we have seen. If this is so, and the words of the statute be not inconsistent

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with it, they must be so construed. The important inquiry always is the legislative intent.

The Supreme Court, by Mr. Justice Clifford, in *Kohlsaat v. Murphy* (96 U. S., 160), said:

“Rules and maxims of interpretation are ordained as aids in discovering the true intent and meaning of any particular enactment; but the controlling rule of decision in applying the statute in any particular case is that whenever the intention of the legislature can be discovered from the words employed, in view of the subject-matter and the surrounding circumstances, it ought to prevail, unless it leads to absurd and irrational conclusions, which should never be imputed to the legislature, except when the language employed will admit of no other signification.”

See also *Neal v. Clark* (95 U. S., 704).

In *Heydenfeldt v. Daney Gold, etc., Co.* (93 U. S., 634), the Supreme Court, speaking by Mr. Justice Davis, said:

“If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment.”

The causes which induced the enactment of the cited provision were, as we have seen, to make a new grade in the revenue service, and the language employed, though not as direct or as apt as it might be, is nevertheless sufficient, “in view of the subject-matter and surrounding circumstances.” There is no defect. The name or title of the grade is given, the qualifications necessary to attain it are prescribed, and also the method of appointment, and from what class of officers.

The assumption of the existence of a grade or the recognition of it is enough for its creation. A striking example of this kind, and especially applicable, is the case of *Postmaster-General v. Early* (12 Wheat., 135). In March, 1815, Congress passed “An act to vest more effectually in the State

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courts and in the district courts of the United States jurisdiction in the cases therein mentioned." The fourth section contained this clause: "*And be it further enacted*, That the district court of the United States shall have cognizance, concurrent with the courts and magistrates of the several States, and the circuit courts of the United States, of all suits at common law, where the United States, or any officer thereof, under the authority of any act of Congress, shall sue, although the debt, claim, or other matter in dispute shall not amount to one hundred dollars."

The question arose, did this clause give jurisdiction to the circuit court of the United States as well as the district court? The court, by Mr. Chief Justice Marshall, said:

"The language of the act is, that the district court shall have cognizance, concurrent with the courts and magistrates of the several States and the circuit courts of the United States, of all suits, etc. What is the meaning and purport of the words 'concurrent with' the circuit courts of the United States? Are they entirely senseless? Are they to be excluded from the clause in which the legislature has inserted them, or are they to be taken into view and allowed the effect of which they are capable? The words are certainly not senseless. They have a plain and obvious meaning. And it is, we think, a rule that words which have a meaning are not to be entirely disregarded in construing a statute. We can not understand this clause as if these words were excluded from it. They, perhaps, manifest the opinion of the legislature that the jurisdiction was in the circuit courts; but ought, we think, to be construed to give it, if it did not previously exist. * * * It has been said, and perhaps truly, that this section was not framed with the intention of vesting jurisdiction in the circuit courts. The title of the act, and the language of the sentence, are supposed to concur in sustaining this proposition. The title speaks only of State courts. But it is well settled that the title can not restrain the enacting clause. It is true that the language of the section indicates the opinion that jurisdiction existed in the circuit courts, rather than an intention to give it; and a mistaken opinion of the legislature concerning the law

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does not make the law. But if this mistake be manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. This law expresses the sense of the legislature on the existing law as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction. We think, therefore, that in a case plainly within the judicial power of the Federal courts, as prescribed in the Constitution, and plainly within the general policy of the legislature, the words ought to receive this construction."

See also *State v. Miller* (23 Wis., 634).

Another difficulty is urged in your second proposition. You ask:

"If the grade of captain of engineers is created by the provision cited, and it is filled by the appointment, what would be the 'pay and emoluments' of such 'captain of engineers'?"

To appreciate the reason of the inquiry, we must again quote the "cited provision:"

"*Provided*, That any chief engineer of the Revenue-Cutter Service, who has held the office of engineer in chief, shall hereafter receive the pay and emoluments of a captain of said service, and shall be eligible for appointment to the office of captain of engineers in said service, with the pay and emoluments of such captain."

The ambiguity is in the relation of the words "such captain." It is easily resolved. Ordinarily the word "such" refers to the next immediate antecedent, but not necessarily; never when the purpose of the section would thereby be impaired. (*Summerman v. Knowles*, 33 N. J., 205.)

Broom, in his *Legal Maxims*, after quoting the maxim "*Ad proximum antecedens fiat relatio, nisi impediatur sententia*," says:

"Relative words must ordinarily be referred to the next antecedent, where the intent upon the whole deed or instrument does not appear to the contrary, and where the matter itself doth not hinder it; the 'last antecedent' being the last word which can be made an antecedent so as to have a meaning.

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“But although the above general proposition is true in strict grammatical construction, yet there are numerous examples in the best writers to show that the context may often require a deviation from this rule, and that the relative may be connected with nouns which go before the last antecedent, and either take from it or give to it some qualification.”

The learned author cites numerous authorities to sustain his text.

Applying the rule to the “cited provision,” the words “such captain” must be held to refer to the captain of the revenue service. That office had defined emoluments. It was naturally made a measure, and, so regarding it, meaning and completeness is given to the language used. It would be defective else, and hence an exception to the maxim of relation is necessarily indicated.

From these views it follows that the “cited provision,” creates (1) the office of captain of engineers; (2) the pay is that of the captain of the revenue service, to wit, \$2,500 per annum (Rev. Stat., 2753); (3) the appointment is to be made from the chief engineers who have held the office of engineer-in-chief, and (4) by the President, by and with the advice and consent of the Senate (sec. 2751).

Respectfully, yours,

JOSEPH McKENNA.

The SECRETARY OF THE TREASURY.

TAX ON CIRCULATING NOTES—ATTORNEY-GENERAL—COMPROMISE.

Banks of the United States are liable for the tax of 10 per cent on the circulating notes issued by banks in Canada, for circulation in Canada, which have passed over the line and been received by such United States banks and paid out by them within the United States.

The intent and meaning of the twentieth section of the act of February 8, 1875, was to apply the tax to the amount of the circulating notes issued by any of the persons or corporations named in the statute, and used by the banks and other persons therein named.

Whether the statute of limitations does or does not bar a claim on behalf of the Government is a judicial question to be determined by the courts and not by the Attorney-General.

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It does not appear to be necessary that resort should be had by the Government to a "suit or prosecution" in order to a recovery of the penalty of 5 per cent and the interest of 1 per cent per month for which the banks are liable.

This is a case which the Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise under section 3229, Revised Statutes.

DEPARTMENT OF JUSTICE,

June 25, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of May 12, presenting for my opinion the questions arising out of the use by the Calais National Bank and the Calais Savings Bank, in common with other banks of Calais, Me., of circulating notes issued by banks in Canada for circulation in Canada, which had passed over the line and been received by banks of the United States and paid out by them within the United States.

It appears from the recitals in your letter that upon the returns made by the banks of Calais, Me., an assessment was made by the Treasury Department of 10 per cent upon the circulating notes of Canada banks, which had been received and paid out within the United States by the banks in Calais, under and in pursuance of section 20 of the act of February 8, 1875 (18 Stat., 311).

You request an opinion upon the following points hereinafter stated:

You call my attention to the opinion of Solicitor-General Aldrich (20 Opin., 534), and state that in view of certain questions presented to you in the printed brief, which do not appear to have been considered by Solicitor-General Aldrich, and in view of the brevity of his opinion, you "deem it advisable to obtain a further opinion on the points argued by counsel in their brief."

The delay in replying to your request has been occasioned by frequent oral arguments submitted to me, in the interval, by counsel on behalf of the banks.

I have considered fully and attentively the case as presented in your letter, in the light of the law bearing upon it and the argument of counsel.

To the first point, "Are the banks liable for the tax of 10 per cent on the circulating bank notes of the banks of

Tax on Circulating Notes—Attorney-General—Compromise.

St. Stephens, received and paid out as current funds, upon the facts stated below, under the act of February 8, 1875," I reply that they are.

The act of February 8, 1875 (18 Stat., 307), provides:

"SEC. 19. That every person, firm, association, other than national banking associations, and every corporation, State bank, or State banking association, shall pay a tax of ten per centum on the amount of their own notes used for circulation and paid out by them.

"SEC. 20. That every such person, firm, association, corporation, State bank, or State banking association, and also every national banking association, shall pay a like tax of ten per centum on the amount of notes of any person, firm, association, other than a national banking association, or of any town, city, or municipal corporation, used for circulation and paid out by them."

It is insisted that the words "used for circulation," which were added to section 20 by the act of February 8, 1875, were intended to restrict the meaning and effect of the words "paid out by them," which occur in the previous statutes.

Perhaps a recurrence to the antecedent legislation will afford the safest interpretation of the intent and purpose of Congress as we find it declared in the varying forms of expression employed in successive acts.

On the 17th day of July, 1862, Congress enacted:

"No private corporation, banking association, firm, or individual, shall make, issue, circulate, or pay any note, check, memorandum, token, or other obligation, for a less sum than one dollar, intended to circulate as money, or to be received and used in lieu of lawful money of the United States."

March 3, 1863, Congress enacted—

"That all banks, associations, corporations, or individuals issuing notes or bills for circulation as currency shall be subject to and pay a duty * * * upon the average amount of circulation of notes or bills as currency issuing beyond the amount hereinafter named." * * *

June 30, 1864, an act was passed imposing a duty upon the average amount of circulation issued by—

"Circulation issued by any bank, association, corporation, company, or person, including as circulation all certified

Tax on Circulating Notes—Attorney-General—Compromise.

checks, and all notes and other obligations calculated or intended to circulate or to be used as money." * * *

March 3, 1865, it was further enacted—

"That every national banking association, State bank, or State banking association shall pay a tax of ten per centum on the amount of notes of any State bank or State banking association paid out by them after the first day of July, 1866."

On the 13th of July, 1866, it was enacted, by amendment—

"That every national banking association, State bank, or State banking association shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association used for circulation and paid out by them after the first day of August, 1866."

March 26, 1867, it was enacted—

"That every national banking association, State bank, or banker, or association shall pay a tax of ten per centum on the amount of notes of any town, city, or municipal corporation paid out by them after the first day of May." * * *

February 8, 1875, the act of which sections 19 and 20 are a part was enacted, and is the law under which these assessments complained of were made.

It is quite evident from this that the words "used for circulation" and "paid out by them," were understood and intended to mean very different things.

A bank might pay out notes, such as notes "payable in merchandise," not intending that they should be "used for circulation." On the other hand, they might have in their possession notes to be used for circulation, but as to which they would not be liable to the tax unless such notes were actually "paid out" by them. An illustration of this is presented in the opinion of Attorney-General Olney (20 Opin., 695), in which he held that notes of a national bank, properly executed and ready to be issued, are not liable to the tax while they remain in the vaults of the bank.

The main object of all the Federal legislation on this subject was to secure for the national currency the exclusive use in the United States as a circulating medium; and this object was sought to be effected by imposing upon all competitive paper money such a tax as would make its issue unprofitable.

Tax on Circulating Notes—Attorney-General—Compromise.

In *National Bank v. United States*, decided October term, 1879 (101 U. S., 1), the question of the constitutionality of section 3413, Revised Statutes, imposing a tax of 10 per centum "on the amount of notes of any town, city, or municipal corporation" paid out by any bank or banker, Chief Justice Waite said:

"The tax is on the notes paid out; that is, made use of as a circulating medium. Such a use is against the policy of the United States. Therefore, the banker who helps to keep up the use by paying them out—that is, employing them as the equivalent of money in discharging his obligations—is taxed for what he does. The taxation was no doubt intended to destroy the use; but that, as has just been seen, Congress had the power to do."

Had this decision been made before the passage of the act of February 8, 1875, Congress might have deemed it unnecessary to amend section 3413, Revised Statutes, by adding the words "used for circulation," for the Supreme Court, in that opinion, very clearly indicated that the banker who pays out notes thereby helps to keep up their use as a circulating medium.

We have seen that from the earliest act of Congress—that of July, 1862—down to the latest, the prohibition has been laid upon the use of notes "intended to circulate as money," "for circulation as currency," "intended to circulate, or to be used as money," and "used for circulation."

By the act of March 3, 1863, a duty was imposed upon banks or individuals "issuing notes or bills for circulation as currency."

On March 3, 1865, a tax was imposed upon banks of 10 per cent on the amount of notes of any State bank paid out by them.

Up to that time banks had been required to pay the duty or tax only on the average amount of notes *issued* by them—that is, made by them. But it was discovered that this was not sufficient to effect the principal object of destroying all competition with national currency. That, for one bank of circulation which paid a tax on notes issued by it, there might be a hundred banks of discount and deposit which

Tax on Circulating Notes—Attorney-General—Compromise.

had no circulation of their own but which received their deposits and paid out their discounts in the notes of the bank of circulation, thereby giving to them extensive circulation; and if such notes were issued by a national bank, their extended use by the banks having no circulation of their own took away inducement to the creation of additional national banks; and if the circulation was that of a State bank, it offered dangerous competition to the national currency, and was enabled to pay the tax on the circulation issued by it by reason of the untaxed use of that circulation by other banks having no circulation of their own.

It was doubtless to meet this contingency that the act of March 3, 1865, was passed, which by a process of evolution has taken on the form it now wears under the act of February 8, 1875.

Some of the inferior Federal courts have held that the mere paying out of notes by a bank was evidence of the intent to use them for circulation. But in many parts of the country individuals, partnerships, and corporations engaged in mining or manufacturing enterprises, for the convenient conduct of their own business, issued certificates or promises to pay in merchandise, designed originally for use between the employer and the employees alone, but which gradually acquired neighborhood circulation. And in 1884 the question came before the Supreme Court in *Hollister v. Mercantile Institution* (111 U. S., 62), whether notes payable "to bearer for a given sum in merchandise at retail, paid out and used as circulation, were subject to the 10 per cent tax imposed by the statute of February 8, 1875 (18 Stat., 311)." Chief Justice Waite, delivering the opinion of the court, said:

"From this review of the legislation on the general subject, and the apparently studied use by Congress of words of appropriate signification whenever it was intended to cover anything else than promissory notes, in the commercial sense of that term, we are led to the conclusion that only such notes as are in law negotiable, so as to carry title in their circulation from hand to hand, are the subjects of taxation under the statute. It was, no doubt, the purpose of Congress, in imposing this tax, to provide against compe-

Tax on Circulating Notes—Attorney-General—Compromise.

tition with the established national currency for circulation as money, but as it was not likely that obligations payable in anything else than money would pass beyond a limited neighborhood, no attention was given to such issues as affecting the volume of the currency or its circulating value."

Such notes, therefore, although "paid out" by the banks, were not regarded as "used for circulation."

A distinction is sought to be taken between "notes used for circulation" and "notes used as current funds."

The distinction, if any exists, is too impalpable to form a difference. And if, indeed, such difference existed, it would be difficult to understand the necessity for and meaning of section 20 of the act of February 8, 1875.

The paper circulating medium of the country consists of the notes issued directly by the United States, the national bank notes, and the State bank notes—if any exist.

The notes paid out and used for circulation by the banks are the notes issued by the bank which first pays them out and the notes of the United States and of the other banks.

Section 19 provides that every person and corporation, other than a national banking association, shall pay a tax of 10 per cent on the amount of *their own* notes used for circulation and paid out by them.

Section 20 provides that every such person or corporation and "also every national banking association" shall pay a tax of 10 per cent on the amount of the notes of any person, firm, or corporation, *other than a national banking association*, used for circulation and paid out by them.

What effect section 20 could possibly have except to impose a tax on the amount of other notes than its own, paid out by a bank as circulation, is difficult to see.

A vague notion has been suggested that section 20 was intended to apply to cases in which one bank "adopted" the notes issued by another bank as its own and used such notes for circulation.

But if any such case has actually occurred I have been unable to discover evidence of it, and certainly it can not be said that they have been of such frequent occurrence as to have induced the enactment of a legislative remedy to meet them.

Tax on Circulating Notes—Attorney-General—Compromise.

The tax is not upon the creation of the notes, but upon their use as circulation; and if the view contended for on behalf of the Calais National Bank was sound, that bank, by its use as circulation of the notes of the Canadian banks, would be in the enjoyment of an immunity from the 10 per cent tax imposed by the Government to prevent competition with the national currency, from which all other banks in the United States would be excluded.

If the tax is only that imposed by section 19 "on the amount of their own notes used for circulation," and does not reach the use of the notes issued by other persons and corporations, although used for the same purpose, is it not a premium offered to the banks of the United States to dispense with their own issue of notes and employ as a circulating medium the notes of Canadian banks, and thereby get rid of the 10 per cent tax?

I have no doubt that the intent and meaning of the twentieth section was to apply the tax to the amount of the circulating notes issued by any of the persons or corporations named in the statute and used by the banks and other persons therein named.

Second. "If the banks are liable, whether the penalty of 5 per cent and the interest of 1 per cent per month, or any part thereof, is barred by the limitation in section 1047, Revised Statutes."

Statutes of limitations apply to the legal *remedies* and not to the rights of the parties. Whether the statute of limitations does or does not bar a claim on behalf of the Government is, therefore, a judicial question to be determined by the courts and not by the Attorney-General.

Section 3415, Revised Statutes, imposes "a penalty of \$200, besides the additional penalties of forfeitures provided in other cases," for any refusal or neglect to make return and payment of the amount of circulation and tax thereon.

It may be true that section 1047, Revised Statutes, does afford a bar to the maintenance of any "suit or prosecution for any penalty or forfeiture," etc., instituted more than five years from the time when the same accrued, but it does not appear to be necessary that resort should be had by the

Erection of Bethel, Reading Room, and Library on Ship Island.

Government to "suit or prosecution" in order to a recovery of the penalty here.

Third. "Whether the matter, as it now stands, is a contested matter that can be compromised by and with the consent of the Secretary of the Treasury, under the provisions of section 3229, Revised Statutes."

I think this is a case which the Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise under section 3229, Revised Statutes.

Very respectfully,

HOLMES CONRAD,
Solicitor-General.

Approved.

JOSEPH MCKENNA.

The SECRETARY OF THE TREASURY.

ERECTION OF BETHEL, READING ROOM, AND LIBRARY ON
SHIP ISLAND.

The Secretary of War has no authority to grant permission for the erection of a bethel, reading room, and library within the army reservation on Ship Island. (21 Opin., 537, followed).

DEPARTMENT OF JUSTICE,
July 7, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of July 1, in which you transmit a letter addressed to yourself by the Rev. Ebenezer Thompson, dated Biloxi, Miss., June 1, 1897, and stating in part as follows:

"Ever since I left Lansing, eight years ago, I have been stationed as rector of this parish and dean of the coast.

"Directly opposite and in plain sight, 12 miles away, is the harbor of Ship Island, with 25 large vessels loading lumber. About 500 men are employed.

"Except for Fort Massachusetts at the extreme west end, the light-house next, and quarantine station 2 miles east, there are no habitations on the island. It is mostly a desert, barren waste. The officers and men on these ships, the light-house keeper, the stevedores, and others have often

Rock Creek Park.

applied to me to do something for them, as being more completely shut off from civilizing and christianizing influences than almost any port of its size in the world; and at last I have undertaken to write to you in their behalf.

"What we want is a bethel, and a reading room and library, with living rooms for the keeper.

"Money for such a building will be furnished freely. We have abundant offers of books, newspapers, and magazines.

"What we ask is for permission to erect this building on the army reservation. In any other port this building would be erected on private or purchased ground, but this island belongs entirely to the Government."

You request to be advised whether this case falls within my opinion of May 19, 1897, in the matter of the petition for the erection of a Catholic chapel at West Point, N. Y. I answer in the affirmative, and that the War Department does not possess authority to grant the permission applied for. The applicant, as in the West Point case, must be remitted to Congress.

I return the papers herewith, as you request.

Very respectfully,

JOSEPH McKENNA.

The SECRETARY OF WAR.

ROCK CREEK PARK.

The board of control of Rock Creek Park has not the power to authorize the water department of the District of Columbia to construct a reservoir, for the use of the District, within the limits of said park.

DEPARTMENT OF JUSTICE,

July 8, 1897.

SIR: I have the honor to acknowledge the receipt of yours of the 1st instant, inclosing letter of Edward Burr, captain, Corps of Engineers, to Brig. Gen. John M. Wilson, Chief of Engineers, United States Army, and asking my opinion as to whether the board created by section 7 of the act of September 27, 1890, chapter 1001 (26 Stat., 492), has the power to authorize the water department of the District of Columbia to construct a reservoir, for the use of the District, within the limits of Rock Creek Park.

Rock Creek Park.

Rock Creek Park was created by the act referred to, and the purposes for which it was created are described as follows: "That a tract of land * * * shall be secured, as hereinafter set out, and be perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States, to be known by the name of Rock Creek Park."

Section 7 of the act provides that the park thus established "shall be under the joint control of the Commissioners of the District of Columbia and the Chief of Engineers of the United States Army, whose duty it shall be, as soon as practicable, to lay out and prepare roadways and bridle paths, to be used for driving and for horseback riding, respectively, and footways for pedestrians; and whose duty it shall also be to make and publish such regulations as they deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury or spoliation of all timber, animals, or curiosities within said park, and their retention in their natural condition, as nearly as possible."

The question submitted is whether this board of control of lands thus designated and set apart as a public park or pleasure ground, for the benefit and enjoyment of the people of the United States, has any power or dominion over the park save those conferred by section 7.

In considering this statute and the powers of the board of control we must not, of course, restrict it to limits which would preclude the objects which are plainly intended by the statute; that is, the creation of a public park or pleasure ground where people of the United States could resort and find a place of enjoyment. In order to constitute a park of this sort it is necessary for the board of control to have the power to make it a place of enjoyment and of pleasure by the improvement of the scenery, the opening of roadways, bridle paths, footways, the construction of fountains, rustic seats, arbors, and such other conveniences as are required in a park which is set apart for the pleasure and enjoyment of people. It is no doubt also within their power, if they see proper, to plant trees, shrubbery, cultivate flower

Attorney-General—Deserter from the Army.

gardens, and do things of a like nature which would tend to adorn and make the place more attractive. But here the question presented is whether or not they can devote this property thus set apart for the purpose of the erection of a reservoir to be used as a part of the water system of the District of Columbia. In other words, has the board of control the power to take this property, designated and set apart by the act of Congress as a pleasure resort for all the people of the United States who desire to come and enjoy it, and devote it, in part, to the municipal uses of the District of Columbia by the erection of a reservoir to be used in connection with the water system of the said District? The question does not seem to admit of argument, and I unhesitatingly say that there is no such power vested in the board of control. It would, in my opinion, be an entire perversion of the purposes of the dedication.

If the board of control has the power, under the act, to authorize the water department of the District of Columbia to construct a reservoir within the limits of the park for the use of the District, then it would follow that the board has the right to authorize the use of the park for any other public purpose demanded by the District authorities, and thus this tract of land, which was condemned under an act of Congress and dedicated as a public park for the benefit of the whole people of the United States, might eventually be devoted entirely to the necessities of the District of Columbia and the object of the dedication defeated.

Very respectfully,

JOSEPH McKENNA.

The SECRETARY OF WAR.

ATTORNEY-GENERAL—DESERTER FROM THE ARMY.

The cases in which the Attorney-General is authorized to give opinions to the heads of Executive Departments are such as are actually pending in such Departments and involving the legal questions submitted. A convicted deserter from the Army, undergoing sentence, must become the recipient of Executive clemency and must make application for reenlistment before the question of the effect of the President's pardon upon his right to reenlist can arise.

Attorney-General—Deserter from the Army.

DEPARTMENT OF JUSTICE,

July 9, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of May 25, 1897, *in re* Thomas Buchanan, a convicted deserter now undergoing a sentence and who has on file an application for a pardon.

The facts in this case, as set forth in your letter, are as follows: Thomas Buchanan is now a general prisoner at Fort Columbus, N. Y. He enlisted in Company H, Tenth Infantry, United States Army, October 5, 1891, and was discharged October 4, 1896, by expiration of service. He reenlisted October 8, 1896, in Battery H, Fifth Artillery; deserted at Fort Hamilton November 2, 1896; surrendered at that post February 1, 1897; was tried by court-martial, convicted of desertion, and sentenced to be dishonorably discharged, with forfeiture of all pay and allowances, and to be confined at Fort Columbus, N. Y., for eighteen months. Nine months of this sentence were remitted by the reviewing authority, and the prisoner is now serving sentence, which will expire November 16, 1897. He has recently applied to the President, through military channels, for a pardon.

In your letter you say: "To assist the Department in making a recommendation in forwarding the application to the President, I have the honor to request your opinion on the following point:

"In the event of a pardon being granted this man by the President, has the Secretary of War authority to permit him to enlist again in the Army under the present law?"

I do not deem this a case in which I am authorized to give an opinion. Cases in which the Attorney-General is authorized to give opinions to the heads of Executive Departments are such as are actually pending in such Departments and involving the legal questions submitted. Two very important contingencies must occur before the question of the effect of the President's pardon to Buchanan upon his right to reenlist can arise. In the first place, he must become the recipient of the Executive clemency, and in the second place he must make application for reenlistment. If the President should pardon Buchanan, and Buchanan in turn should

Attorney-General—Deserter from the Army.

make application to reenlist, then the question as to the legal effect of the pardon upon Buchanan's disability incurred under the statutes governing the reenlistment of soldiers would be directly presented, and not until then.

I am supported in my declination to give an opinion in this matter in its present status by numerous opinions heretofore rendered, and I cite particularly 9 Opin., 421: "The Attorney-General will not give an opinion on an important legal question when it is not practically presented by an existing case before a Department."

20 Opin., 536: "The Attorney-General is neither required nor authorized to give an opinion to the head of a Department except in cases actually pending for decision by him in such Department."

21 Opin., 109: The authority of the Attorney-General to advise the head of a Department "officially is confined to cases actually and presently arising in the administration" of his Department.

Opinion of March 25, 1897 (21 Opin., 509): "The opinion of the Attorney-General may be asked by the head of any other Executive Department 'on any question of law arising in the administration or his Department.' (Rev. Stat., 356). The inquiry must relate not to a mere moot question, but to one which requires immediate action. The answer must be necessary for the protection of the officer making the inquiry or to insure the lawfulness of the action which he is about to take."

These citations are sufficient to indicate that this is not a case in which I am authorized to give an opinion.

There is no legal principle involved in the course which you may take in forwarding Buchanan's application for a pardon to the President. You can recommend the pardon or refuse to recommend it, as you may deem consistent with the facts in the case. An opinion upon the legal effect of a pardon could have no possible bearing upon the lawfulness of the official action to be taken in forwarding Buchanan's application to the President.

Very respectfully,

JOSEPH MCKENNA.

The SECRETARY OF WAR.

Declarations to Invoices.

DECLARATIONS TO INVOICES.

The person making the declaration to an invoice of goods intended for shipment from a foreign country to the United States under sections 2 and 3 of the customs administrative act of June 10, 1890, is not required to be actually present before the consul, vice-consul, or commercial agent of the United States in order to authorize such consular officer to certify such invoice.

All that is necessary in order to authorize such consular officer to certify the invoice produced, with the declaration indorsed thereon signed, and with the oath attached, is that he shall be satisfied that the person making the oath thereto is the person he represents himself to be; that he is a credible person, and that the statements made under such oath are true.

If he should have doubts as to the identity of the person making the declaration, as to his credibility, or as to the truthfulness of the statements set forth in the declaration, he would have the right to require the declarant to come personally before him.

Under section 249, Revised Statutes, the Secretary of the Treasury has power to prescribe rules and regulations for the collection of duties on imports, and the question as to where and in what manner the oaths to the declarations indorsed on invoices shall be taken is more a matter of regulation or instruction for the government of the consular officers than of construction of the statute.

DEPARTMENT OF JUSTICE,

July 15, 1897.

SIR: I find among the matters in this Department not acted upon by my predecessor a communication from you under date of December 17, 1896, asking an opinion upon section 3 of the customs administrative act of June 10, 1890, chapter 407.

You say that it has been represented to the Treasury Department that houses which maintain branches in Manchester, England, for the purpose of collecting and forwarding to the United States shipments purchased in various places in Great Britain are put to serious inconvenience by the requirement that declarations to invoices under the above section shall be made in the respective consular districts in which such purchases are made, and it is proposed that such declarations shall be made before any officer who has been duly authorized under the laws of the respective countries to administer oaths, or before any United States consul, and that the invoice, containing the declaration duly indorsed thereon, shall be produced for authentication to the United States consul in the

Declarations to Invoices.

district from which the goods are to be exported. You cite sections 1715, 2855, and 2862 of the Revised Statutes, and request an opinion as to whether there is any legal objection to a consul issuing a certificate to an invoice when the person who makes the declaration and takes the oath does not in person present it to him for authentication.

Section 2 of the act under consideration prescribes the manner of making the invoice of goods intended for shipment from a foreign country to the United States. Section 3 of the act provides that the invoice thus prepared shall be *produced* to the consul, vice-consul, or commercial agent of the United States of the consular district in which the merchandise was manufactured or purchased, as the case may be, for export, and the invoice shall have indorsed on it, when so produced, a declaration signed by the purchaser, manufacturer, owner, or agent, setting forth that the invoice is in all respects correct and true, and was made at the place from which the merchandise is to be exported to the United States, and that it contains, if the merchandise was obtained by purchase, a true and full statement of the time when, the place where, the person from whom the same was purchased, and the actual cost thereof, and of all charges thereon as provided by this act.

Section 1715 of the Revised Statutes provides as follows:

"No consular officer shall certify any invoice unless he is satisfied that the person making oath thereto is the person he represents himself to be, that he is a credible person, and that the statements made under such oath are true, and he shall thereupon, by his certificate, state that he was so satisfied."

These three sections seem to be easily construed and the meaning readily arrived at; that is, that the invoice, prepared as required by section 2, shall be produced to the officer or agent of the United States named in section 3, of the consular district in which the merchandise described in the invoice was manufactured or purchased, and at the time of the production of the invoice to the officer or agent named it must have indorsed on it a declaration signed by the purchaser, manufacturer, or owner of the merchandise, or the agent of such purchaser, manufacturer, or owner, that the

Declarations to Invoices.

invoice is in all respects correct and true and was made at the place from which the merchandise is to be exported to the United States, etc. In addition to being signed, the declaration must be sworn to, and all that is necessary in order to authorize the consular officer to certify the invoice produced, with the declaration indorsed thereon signed, and with the oath attached, is that he shall be satisfied that the person making the oath thereto is the person he represents himself to be, that he is a credible person, and that the statements made under such oath are true. I see no reason why the consular officer could not issue a certificate to the invoice when the person who makes the declaration and takes the oath is not personally present before such officer. I see nothing in the law which requires that the person making the declaration should be actually present before the consul, vice-consul, or commercial agent, nor is there anything in the statutes that indicates that the oath to the declaration should be administered only by such consular officer. The only requirement seems to be that the invoice, with the declaration, in proper form as required by the act, shall be produced to the consul, vice-consul, or commercial agent of the United States of the consular district in which the merchandise was manufactured or purchased, as the case may be. But if the consular officer before whom the invoice is produced with a declaration indorsed should have doubts as to the identity of the person making the declaration, as to his credibility, or as to the truthfulness of the statements set forth in the declaration, he would have the right, if necessary, to require the declarant to come personally before him. The law, as set forth in the sections cited, vests in the officers of the United States who are required to certify invoices a large discretion as to what will be required in order to place them in a position to certify such invoices. This power is derived from section 2862 of the Revised Statutes, which reads as follows:

“All consular officers are hereby authorized to require, before certifying any invoices under the provisions of the preceding sections (being sections 2853 and 2854 of the Revised Statutes, which sections are now repealed, and sections 2 and 3 of the act of June 10, 1890, substituted therefor), satisfactory evidence, either by the oath of the person

Declarations to Invoices.

presenting such invoices or otherwise, that such invoices are correct and true. In the exercise of the discretion hereby given the consular officers shall be governed by such general or special regulations or instructions as may be from time to time established or given by the Secretary of State."

It will be observed in this section that the oath of the person presenting an invoice to the consular officer is not indispensable, but the power is conferred upon such officer to ascertain that the invoice is correct and true, either by the oath of the person presenting it or otherwise, thus confiding to the consular officer the authority to ascertain the facts upon which to base his certification of an invoice in any feasible and proper manner, subject, however, in the exercise of this discretion, to general or special regulations or instructions established or given by the Secretary of State.

The power is also conferred upon the President to prescribe regulations and to make and issue orders and instructions for the government of the diplomatic and consular officers, under section 1752 of the Revised Statutes, which reads as follows :

"The President is authorized to prescribe such regulations and make and issue such orders and instructions, not inconsistent with the Constitution or any law of the United States, in relation to the duties of all diplomatic and consular officers, the transaction of their business, etc. * * * from time to time as he may think conducive to the public interest."

I call attention also to section 249 of the Revised Statutes :

"The Secretary of the Treasury shall direct the superintendence of the collection of duties on imports and tonnage as he shall judge best."

Under this section the Secretary of the Treasury undoubtedly is authorized to prescribe reasonable rules and such as are necessary to secure the collection of the duties on imports and to protect the United States from irregular or fraudulent proceedings.

Upon the whole, the statute is clear, and the question as to where and in what manner the oaths to the declarations indorsed on invoices shall be taken is more a matter of reg-

Chinese.

ulation or instruction for the government of the consular officers than of construction of the statute.

Respectfully,

JOSEPH McKENNA.

The SECRETARY OF THE TREASURY.

CHINESE.

The Secretary of the Treasury has no authority to permit the return to the United States of Chinese laborers who left for China after having received the necessary certificates entitling them to return, and availed themselves of the extension of one year provided by the treaty of 1894, and who, although they left China in sufficient time to reach the United States within the extended year, were delayed in quarantine by the Canadian authorities, so that in fact they did not reach this country until three days late.

In the extension of one year the treaty has made the sole provision for delay, and in any event the laborer must return to the United States within the additional year.

Neither the Secretary of the Treasury nor the collector has discretion to inquire into causes of further delay or grant an additional extension.

DEPARTMENT OF JUSTICE,

July 16, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of the 21st ultimo, requesting my opinion as to the authority of the Secretary of the Treasury, under the treaty of 1894 between the United States and China, to allow the admission to this country of two Chinese laborers, Dang Tip and Dang Ng, who apply for permission to return under the following circumstances:

The treaty of 1894 (Art. I) absolutely prohibits the coming of Chinese laborers to the United States, except under specified conditions. Article II, prescribing these conditions, permits a registered Chinese laborer, having certain interests here in the way of kin or property, to leave the United States and come back, upon complying with certain regulations. The laborer must deposit with the collector of customs of the district he departs from a statement identifying and bringing himself within the article. Thereupon the collector furnishes him a certificate of his right to return. "Such right

Chinese.

of return to the United States," says the treaty, "shall be exercised within one year from the date of leaving the United States." Recognizing the obvious contingency that a laborer might, by causes beyond his control, be prevented from returning within the year, the treaty provides for an extension of the term of absence as follows:

"But such right of return to the United States may be extended for an additional period, not to exceed one year, in cases where, by reason of sickness or other cause of disability beyond his control, such Chinese laborer shall be rendered unable sooner to return, which facts shall be fully reported to the Chinese consul at the port of departure and by him certified, to the satisfaction of the collector of the port at which such Chinese subject shall land in the United States."

Such being the law, Dang Tip and Dang Ng left the United States at the Vermont district on May 28, 1895, each having, after compliance with the regulations, received a certificate from the collector at St. Albans assuring him of his right to return within twelve months from that date.

Before the twelve months expired each of the laborers availed himself of the extension of one year, Dang Tip on the ground of sickness and Dang Ng because of the death of his wife.

Knowing their certificates, as extended, would expire May 28, 1897, the two left Hongkong on April 7, 1897, and, being detained in quarantine by the Canadian authorities at Vancouver, did not reach the United States until three days after their certificates had expired. They apply for admission on the ground that they left China in time to get here before their certificates expired, and were prevented by a cause beyond their control, namely, the Canadian quarantine. For this they say they ought not to suffer.

It might be suggested that a quarantine is not "*actus Dei*," but an ordinary incident of travel by sea, to be contemplated by one undertaking a voyage; but, aside from this consideration, it is apparent that in the extension of one year the treaty has made the sole provision for delay, whether "by reason of sickness or other cause of disability beyond the control" of the laborer desiring to return. Mode

Contracts for Naval Supplies—Advertisements.

of proof of such course of delay is provided and a limit put on the period of extension; *in any event* the laborer must return to the United States within the additional year. In the case of an extension the date of the original certificate and the date of the return must control. Neither the collector nor the Secretary of the Treasury has discretion to inquire into causes of further delay, or grant additional extensions. The impracticability of enforcing the treaty if such inquiries are permitted is apparent.

My opinion, therefore, is that the Secretary of the Treasury has no authority to permit the return to this country of the laborers mentioned.

Very respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOSEPH McKENNA.

The SECRETARY OF THE TREASURY.

CONTRACTS FOR NAVAL SUPPLIES—ADVERTISEMENTS.

A contract with a gun company for the manufacture and delivery to the Navy Department of a number of guns, the manufacture of materials to be subject to the inspection and approval of the Department, supplemented by an agreement providing for the manufacture of the guns at a particular place, and for keeping an account of the cost of labor involved, in order to arrive at the remuneration ultimately to be paid to said gun company, is a contract for supplies to the Navy Department, and not for services, and a contract with another company for the manufacture of any of said guns may be made by the Navy Department as a contract for ordnance without submitting the subject-matter thereof to competition by public advertisement.

DEPARTMENT OF JUSTICE,
July 21, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of July 15, in which you inclose copies of a contract dated February 5, 1897, between the Navy Department and the Maxim-Nordenfelt Company, of London, England, and of an agreement supplemental thereto, dated April 14, 1897, for the manufacture and delivery of 100 1-pounder

Contracts for Naval Supplies—Advertisements.

Maxim-Nordenfelt guns with accessory parts. You state that the Navy Department, in view of the importance of maintaining in the United States factories for the manufacture of guns of this type, is willing to have a certain number of Maxim-Nordenfelt guns so contracted for made by the American Ordnance Company, of Bridgeport, Conn., and has the consent thereto of the Maxim-Nordenfelt Company, and you request an expression of my opinion whether a contract made by the Navy Department with the American Ordnance Company for the construction of any of the guns embraced in the contract and agreement above described could be made as a contract for "ordnance" under section 3721 of the Revised Statutes, without submitting the subject-matter thereof to competition by public advertisement, or whether such contract would fall within the meaning of section 3709 as a contract for services requiring advertisement "a sufficient time previously for proposals respecting the same."

Section 3709 provides that "all purchases and contracts for supplies or services in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles or performance of the service." Section 3721 provides that "the provisions which require that supplies shall be purchased by the Secretary of the Navy from the lowest bidder, after advertisement, shall not apply to ordnance, gunpowder," etc.

The contract with the Maxim Company of February 5, 1897, contemplates that they shall manufacture and deliver or furnish to the Navy Department 100 guns, the manufacture of materials to be subject to the inspection and approval of the Department. The agreement of April 14, 1897, supplements and modifies the contract, chiefly by providing for the manufacture of the guns at the Naval Gun Factory in Washington, and by certain provisions for keeping account of the cost of labor involved, in order to arrive at the remuneration ultimately to be paid to the Maxim Company. In view of these facts it is my opinion that this is a contract for sup-

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plies to the Navy Department, and not for services, and as such is excepted by section 3721, relating, among other articles, to ordnance, from the provisions of section 3709 respecting advertisements for proposals.

I therefore answer your question by stating that a contract made by the Navy Department with the American Ordnance Company for the manufacture and delivery of any of said 100 guns under the terms and conditions of the contract and agreement with the Maxim-Nordenfelt Company would be a contract for "ordnance," which could be made without submitting the subject-matter thereof to competition by public advertisement.

Very respectfully,

JOSEPH McKENNA.

The SECRETARY OF THE NAVY.

ARMY OFFICERS—VOLUNTEER SERVICE.

Persons who served during the rebellion in the Army of the United States as officers in the volunteer service and have been honorably mustered out of such service, are entitled to bear the official title, and upon occasions of ceremony to wear the uniform of the highest grade they have held in the volunteer service.

DEPARTMENT OF JUSTICE,

July 23, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of the 14th ultimo, requesting an opinion whether section 1226 of the Revised Statutes is applicable to persons who were officers in the volunteer service during the late war, but are not now officers in the Regular Army.

The request for the opinion grows out of the application of James F. Farrell, late a captain of the Fifth New York Heavy Artillery, and brevetted major of United States Volunteers, to your Department for instructions as to the kind of uniform he is entitled to wear under this section.

I am not altogether satisfied that the application of this private citizen raises a question of law in the administration of your Department which properly calls for an opinion from

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me, but it appears from the inclosures, and I am otherwise informed, that proper cases demanding a decision of the same question are pending in several of the Executive Departments, so I am disposed to regard the rule advanced by my predecessors when declining to give opinions as perhaps inapplicable to the existing situation.

The section in question reads as follows:

"SEC. 1226. All officers who have served during the rebellion as volunteers in the Army of the United States, and have been honorably mustered out of the volunteer service, shall be entitled to bear the official title, and upon occasions of ceremony to wear the uniform, of the highest grade they have held, by brevet or other commissions, in the volunteer service. The highest volunteer rank which has been held by officers of the Regular Army shall be entered, with their names, respectively, upon the Army Register. But these privileges shall not entitle any officer to command, pay, or emoluments."

This section speaks for itself; the language is plain; it requires no construction. In its leading features—the bearing of an official title and the wearing of a uniform upon occasions of ceremony—the section applies only to ex-officers who have served during the rebellion as volunteers, and have been honorably mustered out of that service, and are not now in the Regular Army. The only privilege granted to officers of the Regular Army who acquired rank in the volunteer service is the entry of their highest volunteer rank upon the Army Register.

Both departmental and legislative construction confirm the accuracy of the above conclusions. (War Department, General Orders, No. 78, August 24, 1867; act of February 4, 1897, 29 Stat., 511.)

Your question is therefore answered in the affirmative.

Very respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOSEPH McKENNA.

The SECRETARY OF WAR.

Chinese—Certificates as to Citizenship.

CHINESE—CERTIFICATES AS TO CITIZENSHIP.

The certificate of a United States commissioner states that a Chinaman charged with unlawfully coming within the United States, after a full hearing, was adjudged to have the lawful right to remain in the United States, and was accordingly discharged, it appearing that he is a citizen of the United States: *Held*, that certificates of this character should not be accepted as sufficient evidence of the right of the holders to enter this country.

Since the act of May 6, 1882, no court has jurisdiction to admit Chinese to citizenship.

Whether or not children born in this country of subjects of the Chinese Empire are to be recognized as citizens of the United States: *Quere*.

DEPARTMENT OF JUSTICE,

August 4, 1897.

SIR: I have the honor to acknowledge the receipt of your letter of July 30, 1897, transmitting a copy of a report, dated July 26, 1897, with its original inclosure, from the collector of customs at Burlington, Vt., relating to the admission into this country of Chinese persons who present certificates (in the form of the said inclosure) issued by F. W. McGettrick, United States commissioner for the district of Vermont. You request my opinion whether, under existing laws, certificates of the character referred to should be accepted as sufficient evidence of the right of the holders to enter this country.

The certificate states, under the hand and seal of the commissioner, that on complaint of the United States attorney for said district, one Chu Lock did, on or about March 16, 1896, unlawfully come within the United States, and that said defendant was on said date brought before the commissioner, and after a full hearing it was adjudged that the defendant had the lawful right to remain in the United States, and he was accordingly discharged, it appearing that he was a citizen of the United States.

The third section of the act of May 5, 1892 (Chinese exclusion act, 27 Stat., 25), provides—

“That any Chinese person or person of Chinese descent arrested under the provisions of this act, or the acts hereby extended, shall be adjudged to be unlawfully within the United States unless such person shall establish by

Chinese—Certificates as to Citizenship.

affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."

It is to be presumed that in the case in hand, and in similar cases, the defendant has established by affirmative proof, to the satisfaction of the commissioner, his lawful right to remain in the United States; but whether or not the character and measure of the proof has met the requirements of the act, it appears from the face of the certificate that the ground of defendant's right to remain in the United States is his alleged citizenship. Is he or can he be a citizen of the United States, being a Chinese person or person of Chinese descent?

The fourteenth section of the act of May 6, 1882 (1 Supp. Rev. Stat., 342) provides—

"That hereafter no State court or court of the United States shall admit Chinese to citizenship, and all laws in conflict with this act are hereby repealed."

It is therefore clear that since the date of this act no court has had jurisdiction to admit Chinese to citizenship. It has been held that a native of China is not entitled to become a citizen of the United States under the Revised Statutes as amended in 1875 (*in re Ah Yup*, 5 Saw., 155; 21 Opin., 37), and it is not yet finally decided whether or not children born in this country of subjects of the Chinese Emperor are to be recognized as citizens of the United States. A case is pending in the Supreme Court in which that question is raised, but an opinion has not yet been handed down. A different question would be presented in the case of a child of Chinese parents born in this country, and whose father had been legally naturalized, but this state of facts is not presented on the papers submitted.

I am therefore of the opinion that certificates of the character referred to should not be accepted as sufficient evidence of the right of the holders to enter this country.

I return herewith the original certificate, as you request.

Very respectfully,

JOSEPH McKENNA.

THE SECRETARY OF THE TREASURY.

Fur Seals—Attorney-General.

FUR SEALS—ATTORNEY-GENERAL.

A request for an opinion failing to state definite facts showing by what persons, in what manner, and during what period of the year fur seals are being killed in the passes of the Aleutian Islands, it is impossible to determine whether the administrative duty imposed upon the Secretary of the Treasury by section 1956, Revised Statutes, is or is not qualified by the provisions of the act of April 6, 1894.

In the absence of facts presenting a case actually or presently arising and pending in the administration of a department, calling for action, which can not be determined by the Attorney-General without usurping judicial functions, his official opinion can not be required.

DEPARTMENT OF JUSTICE,

August 6, 1897.

SIR: I have the honor to acknowledge the receipt of your letter of July 19, 1897, in which you express the view that the opinion of my predecessor, under date of January 5, 1897, regarding fur seals, to which I have referred you in my letter of July 10, is limited to questions affecting the Macah Indians, and leaves undetermined the question whether or not the act of April 6, 1894, which was passed to carry into effect the provisions of the Paris award, repeals in whole or in part the provisions of section 1956, Revised Statutes; and you ask whether, in the event section 1956 is repealed by the said act, it is lawful for any person to take fur seals in the passes of the Aleutian Islands, provided, in so doing, they comply with the requirements of sections 1 to 5 of said act of April 6, 1894.

In your previous letter of July 8, 1897, to which the foregoing correspondence related, you stated that you had been informed by the lessee of the sealing right on the Pribilof Islands that seals are being caught and killed by unauthorized persons in the passes of the Aleutian Islands, and that the lessee has requested that steps be taken to prevent such killing, and you then ask the following questions:

“First. Does the act of April 6, 1894, repeal the provisions of section 1956, Revised Statutes, in whole or in part?”

“Second. If said section 1956 is not affected by said act of April 6, 1894, is it lawful for Indians or others to kill fur

Fur Seals—Attorney-General.

seals in the Aleutian Passes, provided they comply with the provisions of sections 1 to 5 of said act of April 6, 1894?"

You do not state, for my consideration, any definite facts showing by what persons, in what manner, and during what period of the year fur seals are being caught and killed in the passes of the Aleutian Islands as alleged. It is necessary to have this information in order to determine properly whether the administrative duty imposed upon you by section 1956 to prevent the killing of fur seals is or is not qualified, in any special case submitted, by the provisions of the act of April 6, 1894. In the absence of such facts presenting a case actually or presently arising and pending in the administration of your Department, calling for action, this question can not be determined by me without usurping judicial functions and construing generally the effect produced upon section 1956 by the act of April 6, 1894, apart from reference to a specific case demanding the exercise of your administrative duty. Nor is it proper for me to give a list in advance of the persons, places, and times embraced in the prohibitions of the said section and the permissive provisions of the act of April 6, 1894. I can only answer as to each case as it arises.

It has been held by my predecessors from a very early date that an official opinion can not be required and is not authorized, except in accordance with these principles. I direct your attention to the following recent opinions among others: (18 Opin., 487; 19 Opin., 414, 696; 20 Opin., 383, 440, 526, 602, 614, 618; 21 Opin., 106).

For these reasons I am precluded from responding to your request until I receive such statement of facts as is herein indicated, with such new formulation of the legal questions arising as may seem to you to be required in view of the facts presented.

Respectfully,

JOSEPH MCKENNA.

The SECRETARY OF THE TREASURY.

Revocation of Contract—Ferry Service.

REVOCATION OF CONTRACT—FERRY SERVICE.

In the contract for ferry service between Ellis Island immigrant station and the barge office, New York, to continue for three years, and thereafter from year to year, until terminated by notice from either party, given sixty days before the end of the original period or any one year thereafter, and in which it was also covenanted that the contract might be annulled and terminated at any time by the Secretary of the Treasury for good and sufficient cause: *Held*, that the burning of the buildings on Ellis Island, the removal of the immigrant station from that place, and the discontinuance of the ferry service, supplied a good and sufficient cause to the Secretary of the Treasury for the termination of the contract.

What one party to a contract may have personally understood a provision to mean at the time the contract was made can not avail. What both parties understood controls, and that is to be ascertained from the language of the contract itself.

DEPARTMENT OF JUSTICE,

August 11, 1897.

SIR: On July 1, 1896, Daniel Butterfield, doing business as "The Brooklyn Annex," entered into a contract with the Secretary of the Treasury "to perform and carry on the ferry service" between the Ellis Island immigrant station and the barge office in New York for a stipulated price per day "for each and every day during the said time that the said ferry service shall so be performed," agreeing, for the purpose, to build a new ferry boat, subject to approval by the Commissioner-General of Immigration.

The contract provides that it shall continue in full force for the period of three years ending June 30, 1899, and thereafter from year to year until terminated by notice from either party, given sixty days before the end of the original period or any one year thereafter. Then follows this paragraph:

"Ninth. It is further covenanted and agreed that this contract may be annulled and terminated at any time by the Secretary of the Treasury of the United States for good and sufficient cause."

After inviting my attention to the contract, and more particularly to the provision quoted, you state that, in view of the recent fire at Ellis Island, there is no further necessity for this ferry service, and you request my opinion whether

Revocation of Contract—Ferry Service.

under this paragraph you have authority to terminate the contract.

The contention of the contractor is that the words "good and sufficient cause" in the paragraph mean a cause good and sufficient in law; that the contractor so understood at the time he entered into the contract, otherwise he would not have expended the money he did to build and equip a boat peculiarly adapted to the service, and unfit for any other use, without large additional outlay.

What one party to a contract may have personally understood a provision to mean at the time the contract was made can not avail. What both parties understood controls, and that is to be ascertained from the language of the contract itself.

While it is possible the termination of the contract may work some hardship to the contractor, it is certain that its continuance, under the circumstances, results in daily needless expense to the Government.

The contract provides for a period of three years, and for an extension from year to year thereafter, with power on either side to terminate it after sixty days' notice. A failure or refusal by either party to perform the contract during its continuance would be cause in law for its termination, without any special provision to that end. What, then, was the object of inserting the ninth paragraph? Obviously to provide for a contingency like that which has occurred, the happening of some event which would put a stop to the necessity for the ferry service. The Secretary of the Treasury entered into the contract to serve a public purpose. He agreed to pay for a ferry service because it was needed by the Government. Appreciating the fact that something might occur to terminate the need for the service, he reserved the right to abrogate the contract when the service it provided for should no longer be required in the public interest—in other words, to terminate it "for good and sufficient cause."

I do not understand that the words "good and sufficient cause" are so vague and indefinite as to lack meaning and effect. Similar words were construed by the Court of Claims,

San Pedro Harbor, &c.—River and Harbor Act.

speaking by Judge Weldon, in the case of *Starin v. United States* (31 C. Cls., 66, 88):

“It is not necessary, as insisted by the defendants, to go to the extent of holding that the words “good and sufficient cause” are ineffective. We hold that in this case they are effective to the extent that they circumscribe the power of the defendants to the limits of good faith, and change the power of cancellation from an arbitrary and absolute power to a power regulated by good faith on the part of the party exercising it.”

There can be no question but that the burning of the buildings on Ellis Island, the removal of the immigrant station from that place, and the absolute discontinuance of the ferry service supply a cause “good and sufficient” for the termination of the contract by the Secretary of the Treasury. In the light of these facts it could scarcely be urged subsequently that the Secretary in abrogating the contract acted otherwise than in good faith, and upon reasonable grounds, such as would induce a prudent public officer to annul the contract in the protection of the interests confided to him.

It is therefore my opinion that, in view of the circumstances mentioned, you have authority, under the ninth paragraph, to terminate the contract.

Very respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOSEPH McKENNA.
The SECRETARY OF THE TREASURY.

SAN PEDRO HARBOR, &c.—RIVER AND HARBOR ACT.

The river and harbor act of 1896, provided for a deep water harbor of commerce and of refuge at either San Pedro Harbor or Port Los Angeles and the appointment of a board to select the place and determine the plans of improvement.

The decision of the board as to location of the harbor is final.

The report of the board considered and the conclusion reached that the project reported by them is a breakwater, and that it fulfills the provision of the law and will make within its meaning a harbor for commerce and refuge.

San Pedro Harbor, &c.—River and Harbor Act.

DEPARTMENT OF JUSTICE,

August 9, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of August 3, in relation to San Pedro Harbor.

The inquiry you propound (which will be stated hereafter) grows out of the provision of the river and harbor act of 1896 and a report of a board of engineers provided to be appointed by it.

You express doubts of your duty and power under the act and report of the board as to whether the appropriation is sufficient to provide for a harbor both of commerce and refuge. After some discussion you say—

“It is possible, however, that in order to complete this harbor for commerce and of refuge there may be private subscription by those who are financially interested in the matter, to enable the building of the breakwater, and also to create or deepen the inner harbor and approach to the same. The opinion of the Attorney-General is therefore respectfully requested as to whether the War Department would be justified in advertising for the whole work, and in making a depth of 25 feet instead of 30 feet as suggested in my communication of May 18, heretofore referred to (which would be ample, in my opinion, for the present commerce of the Pacific centering there), and also for an inner harbor (harbor of commerce of, say, half the dimensions named in my letter of May 18).”

This inquiry, may be, should be answered in the negative, but I think the law and your powers under it and as determined by the report of the board may be considered more broadly.

The provision of the river and harbor act is as follows:

“For a deep-water harbor for commerce and of refuge at Port Los Angeles, in Santa Monica Bay, California, or at San Pedro, in said State, the location of said harbor to be determined by an officer of the Navy, to be detailed by the Secretary of the Navy, an officer of the Coast and Geodetic Survey, to be detailed by the Superintendent of said Survey, and three experienced civil engineers, skilled in riparian work, to be appointed by the President, who shall constitute a board,

San Pedro Harbor, &c.—River and Harbor Act.

and who shall personally examine said harbors, the decision of a majority of which shall be final as to the location of said harbor. It shall be the duty of said board to make plans, specifications, and estimates for said improvement. Whenever said board shall have settled the location and made report to the Secretary of War of the same, with said plans, specifications, and estimates, then the Secretary of War may make contracts for the completion of the improvement of the harbor so selected by said board, according to the project reported by them, at a cost not exceeding in the aggregate two million nine hundred thousand dollars, and fifty thousand dollars is hereby appropriated, so much thereof as may be necessary, to be used for the expenses of the board and payment of the civil engineers for their services, the amount to be determined by the Secretary of War: *Provided, however,* That if the board hereby constituted, as in this section provided, shall determine in favor of the construction of a breakwater at Port Los Angeles, no expenditure of any part of the money hereby appropriated shall be made, nor shall any contract for the construction of such breakwater be entered into, until the Southern Pacific Company, or the owner or owners thereof, shall execute an agreement and file the same with the Secretary of War, that any railroad company or any corporation engaged in the business of transportation, may share in the use of the pier now constructed at Port Los Angeles, and the approaches and tracks leading thereto, situate westerly of the easterly entrance to the Santa Monica tunnel, upon such just and equitable terms as may be agreed upon between the parties, and if they fail to agree then to be determined by the Secretary of War; and before any expenditure of the money hereby appropriated is made for the construction of a breakwater at Port Los Angeles said Southern Pacific Company, or the owner of the tracks and approaches leading to said pier, shall execute an agreement and file the same with the Secretary of War, that any railroad or transportation company or corporation desiring to construct a wharf or pier in Santa Monica Bay may, for the purpose of approaching such wharf or pier, and for the purpose of constructing and operating the same, cross the

San Pedro Harbor, &c.—River and Harbor Act.

track or tracks, approaches, and right of way now used by the Southern Pacific Company under such regulations as may be prescribed by the Secretary of War, and upon the payment of such compensation as that officer may find to be reasonable: *Provided, further*, That in event said harbor is located at Port Los Angeles no greater royalty on the rock used for the construction of the breakwater than twelve and a half cents a cubic yard shall be charged, and the Southern Pacific Company shall charge no more than one half a cent a ton mile for freight on rock transported over its road."

The statute therefore provided for a deep-water harbor for commerce and of refuge at one of two places—San Pedro or Port Los Angeles—and the appointment of a board to select the place and determine the plans of improvement.

It will be observed that the powers of the board are large.

There is a limitation of the amount to be expended; in all else the judgment of the board is free. They decide between the places, and the contracts of the Secretary of War are to be "according to the project reported by them." The decision of the board is final as to location, and it shall be their "duty to make plans, specifications, and estimates for said improvement," and upon their report "the Secretary of War may make contracts for the completion of the improvement * * * according to the project reported by them." The law itself besides indicates the project. Both the places mentioned are open roadsteads; in both, therefore, a breakwater is necessary to make protected water—a harbor of refuge—and this may be a harbor of commerce as well. Obviously so at Port Los Angeles, as we shall see.

The report is voluminous, too much so to be quoted, and yet it can hardly be understood any other way. The double function of the board to select, and hence compare sites and report plans for both, led them into comments and comparisons and an intermingling of considerations somewhat confusing; nor did they accurately discriminate that which was to be Government work from that which was to be the work of private enterprise or that which was necessary now and that which might become so with the advance of time and trade. I do not think, however, that the quays or pier or wharves or

Discriminating Duty—Dingley Tariff Act.

the excavation of the docks formed by them are a part of the project reported. They are the means by which private enterprise may avail itself of the project. Some piers were already so erected at Port Los Angeles. They were the property of the Southern Pacific Company and were to remain so. The law only required that other transportation companies should be allowed to use them, but, however, "upon such just and equitable terms" as should be agreed on, or, if agreement fail, "then to be determined by the Secretary of War."

From a careful consideration of the report of the board, I am of the opinion that the project reported by them is a breakwater and that it fulfills the provision of the law and will make within its meaning a harbor for commerce and refuge.

Respectfully, yours,

JOSEPH McKENNA.

The SECRETARY OF WAR.

DISCRIMINATING DUTY—DINGLEY TARIFF ACT.

Diamonds imported into the United States from Canada, not in the usual course of strictly retail trade, which were the productions of a foreign country not contiguous to the United States, are subject to a discriminating duty of 10 per cent under section 22 of the tariff act of July 24, 1897.

In determining the liability of the diamonds to the discriminating duty, it is not necessary to ascertain the mode of conveyance used in transporting them into the United States from Canada.

DEPARTMENT OF JUSTICE,

August 11, 1897.

SIR: In your communication of the 6th instant you state that recently, since the tariff act of July 24, 1897, went into effect, certain diamonds have been imported into the United States from the Dominion of Canada, a foreign country contiguous to the United States. These diamonds were the production of a foreign country not contiguous to the United States, and were worth \$90,000, so they can not be regarded as imported in the usual course of strictly retail trade. The

Discriminating Duty—Dingley Tariff Act.

method of transportation of the diamonds from Canada into the United States, whether by vessel, rail, or otherwise, is not stated.

After calling attention to the provisions of section 22 of the tariff act of July 24, 1897, you inquire—

“*First.* Whether a discriminating duty of 10 per cent under section 22, should be levied on the diamonds described;

“*Second.* Whether, in determining the liability of the diamonds to the discriminating duty, it is material to ascertain the mode of conveyance used in transporting them into the United States from Canada.”

Section 14 of the tariff act of August 28, 1894, provided a discriminating duty of 10 per cent on goods imported in foreign vessels, with certain exceptions, the section reading as follows:

“SEC. 14. That a discriminating duty of ten per centum ad valorem, in addition to the duties imposed by law, shall be levied, collected, and paid on all goods, wares, or merchandise which shall be imported in vessels not of the United States; but this discriminating duty shall not apply to goods, wares, and merchandise which shall be imported in vessels not of the United States, entitled, by treaty or any act of Congress, to be entered in the ports of the United States on payment of the same duties as shall be paid on goods, wares, and merchandise imported in vessels of the United States.”

Section 22 of the tariff act of July 24, 1897, continued the discriminating duty imposed by section 14 of the former law, and added a discriminating duty of 10 per cent on all goods which, “being the production or manufacture of any foreign country not contiguous to the United States, shall come into the United States” from a contiguous country, without being imported “in the usual course of strictly retail trade.” The full text of the section is as follows:

“SEC. 22. That a discriminating duty of ten per centum ad valorem, in addition to the duties imposed by law, shall be levied, collected, and paid on all goods, wares, or merchandise which shall be imported in vessels not of the United States, or which, being the production or manufacture of any foreign country not contiguous to the United States, shall

Discriminating Duty—Dingley Tariff Act.

come into the United States from such contiguous country; but this discriminating duty shall not apply to goods, wares, or merchandise which shall be imported in vessels not of the United States, entitled at the time of such importation by treaty or convention to be entered in the ports of the United States on payment of the same duties as shall then be payable on goods, wares, and merchandise imported in vessels of the United States, nor to such foreign products or manufactures as shall be imported from such contiguous countries in the usual course of strictly retail trade."

The former law imposed a discriminating duty only on goods imported in certain foreign vessels. The present law imposes a discriminating duty also on goods which come into the United States from a contiguous country and are the product of a foreign noncontiguous country and are not imported "in the usual course of strictly retail trade."

It will be observed that the word "imported" is not used in connection with goods which "come into" the United States from a contiguous country, save in the exception exempting goods "imported in the usual course of strictly retail trade;" but for the purposes of this opinion it is not necessary to consider the precise effect of the words "come into," as distinguished from the word "imported," if indeed there be any difference in meaning.

In determining whether the goods under consideration are subject to the discriminating duty, it is not material to ascertain the mode of transportation or method of importation; it is sufficient to know that they "come into" the United States from a contiguous country, and are within a class subject to duty, namely, are the "production or manufacture of a foreign country not contiguous to the United States," and are not "imported in the usual course of strictly retail trade."

Your first question is, therefore, answered in the affirmative; your second in the negative.

Very respectfully,

JOHN K. RICHARDS,
Solicitor General.

Approved.

JOSEPH McKENNA.
The SECRETARY OF THE TREASURY.

Obstruction to Navigation—Attorney-General.

OBSTRUCTION TO NAVIGATION—ATTORNEY GENERAL.

Although the Attorney-General can not determine, without considering questions of fact, whether or not a bar in Flushing Creek, formed opposite the mouth of a sewer and offering an obstruction to navigation, is such a case as comes within the exception provided in section 6 of the act of August 17, 1894, the Secretary of War is not precluded from taking such action, inviting the attention of the town authorities of Flushing to the matter, as may be advisable.

The Attorney-General is precluded from answering questions of fact or from considering questions of fact on evidence submitted.

DEPARTMENT OF JUSTICE,

August 19, 1897.

SIR: I am in receipt of your communication of August 4, 1897, with its inclosures, relating to a complaint of certain citizens of the town of Flushing, N. Y., that solid matter discharged through a sewer of said town into Flushing Creek is forming a bar in the creek and thereby injuring the navigable capacity of the same.

It appears from your statement that this sewer drains about one-half of the town and receives the storm waters from several streets, and that there is a bar of very hard, fine sand in Flushing Creek opposite the mouth of the sewer extending nearly halfway across the creek and thereby offering obstruction to navigation; and it also appears that the available depth of water at high tide in the remainder of the channel opposite the bar is as much as prevails in the bay. Certain action in the premises having been recommended to you, you request my opinion whether this case comes within the exception provided in section 6 of the act of August 17, 1894. (28 Stat., 363).

The said section provides, among other things, as follows:

“That it shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the waters of any harbor or river of the United States, for the improvement of which money has been appropriated by Congress, elsewhere than within the limits defined and permitted by the Secretary of War.”

Advertisements for Proposals—District of Columbia.

It is evident that before the legal questions arising can be properly considered by me certain questions of fact should be determined or agreed upon, viz: Whether or not the bar complained of is formed by discharge from the sewer, which, so far as appears, is left to inference; and whether the sand or other material is discharged merely in suspension and is then deposited upon the bar by the ordinary prompt action of gravity, or passes out in solution and is then precipitated. The facts on these points are necessary to determine the question whether the sand or sewage passes from the sewer in a liquid state within the meaning of the above act.

As I am precluded from answering questions of fact or from considering questions of fact on evidence submitted, I am obliged to decline at present to answer your question (19 Opin., 672; 20 Opin., 253). I reach this conclusion without prejudice to your right to take such action, inviting the attention of the town authorities to the matter, as may seem to you advisable. I return the papers herewith.

Respectfully,

JOSEPH MCKENNA.

The SECRETARY OF WAR.

ADVERTISEMENTS FOR PROPOSALS—DISTRICT OF COLUMBIA.

Advertisements, such as those for proposals for the interior finish of a public building in the District of Columbia, need not be made in six newspapers published in said District.

The selection of newspapers in which to publish advertisements of this character in the District of Columbia is in the discretion of the heads of the departments.

DEPARTMENT OF JUSTICE,

August 24, 1897.

SIR: I have the honor to acknowledge the receipt of your letter of August 20 relating to previous correspondence concerning public advertising in the District of Columbia, and advising me that the Treasury Department contemplates at an early date advertising for proposals for the interior finish of the new post-office building in this city, and stating your views that unless it is incumbent under the law to advertise

Advertisements for Proposals—District of Columbia.

in six newspapers published in the District of Columbia, in accordance with the provisions of the act of January 21, 1881 (21 Stat., 317), the interests of the Government would be better subserved by the use of a less number of newspapers. You therefore ask to be advised if it is necessary, under the existing law, to advertise the matter referred to in six newspapers published in the District of Columbia.

The act referred to provides that all advertising required by existing laws to be done in the District of Columbia by any of the departments of the Government shall be given to one daily and one weekly newspaper of each of the two principal political parties, and to one daily and one weekly neutral newspaper.

By section 1 of the act of March 3, 1875 (18 Stat., 342), so much of section 3836 of the Revised Statutes as required all advertisements, notices, and proposals for contracts for "all of the Executive Departments of the Government" among other matter to be advertised by publication in the District of Columbia, was repealed. Section 3709 of the Revised Statutes (amended by the act of January 27, 1894, 28 Stat., 33, and by the act of April 21, 1894, 28 Stat., 58), which requires advertisements for proposals for all purchases and contracts for supplies and services in any of the departments of the Government, except for personal services, does not require the advertising to be done in the District of Columbia.

There appears to be no law now in force requiring the publication of advertisements of this character in the District of Columbia, and it is therefore my opinion that the selection of newspapers in which to publish such advertisements of the Treasury Department in the District is in your discretion as head of the department, and I therefore conclude that it is not necessary for you under the existing law to advertise the matter referred to in six newspapers published in the District of Columbia. (See 14 Opin., 577.)

Very respectfully,

JOSEPH MCKENNA.

The SECRETARY OF THE TREASURY.

Dingley Tariff Act—Discriminating Duty.

DINGLEY TARIFF ACT—DISCRIMINATING DUTY.

Certain goods came from Japan via Vancouver, B. C., and thence per railroad through Canada to Chicago in cars sealed at Vancouver by a United States consular officer: *Held*, not to be subject to a discriminating duty, as section 4228 Revised Statutes is not repealed by section 22 of the Dingley tariff act.

The purpose of this section was to secure to United States vessels the transportation of goods by sea by discriminating against transportation in other vessels to the United States, and also to prevent evasion to a contiguous country.

To hold that there should be a discrimination by different duties upon importations, direct or indirect, under section 22 of the above act, would be to put a new purpose in the law and destroy its unity. This is not compelled by its language or any mischief intended to be remedied.

Section 22 of this act and section 4228 Revised Statutes, as amended, are not coextensive in scope, therefore are complements of each other.

Section 4228 Revised Statutes is in effect made a proviso to section 22 of the Dingley tariff act by the act of July 24, 1897, and as such is not repugnant to section 22.

The operation of section 22 commences with its passage and continues until it is suspended according to section 4228 Revised Statutes, and again takes effect if the reciprocal exemptions of foreign nations be withdrawn.

Savings and exceptions are often introduced in a statute from excessive caution. It would sometimes pervert the intentions of an author of a writing if every other thing of the same general tenor as that excepted should be regarded as embraced in the general words.

Where two acts are passed on the same day, the order of their passage is not important if they can be reconciled.

Two acts under legislative consideration at the same time should be construed as contemporaneous acts in arriving at the intent of the legislature.

Irreconcilable conflict is necessary for an implied repeal of a statute, and the presumption is stronger against implied repeals where provisions supposed to conflict are in the same act or were passed at nearly the same time.

DEPARTMENT OF JUSTICE,

September 20, 1897.

SIR: I have the honor to acknowledge the receipt of your communication of August 10. It is not necessary to quote all of it. You say:

“On the 6th instant I had the honor to submit for your consideration a copy of a letter received by me from the

Dingley Tariff Act—Discriminating Duty.

Treasury's special agent at Ogdensburg, N. Y., which involved the question whether, under section 22 of the new tariff act, a discriminating duty of 10 per cent should be assessed upon certain diamonds brought into the United States from the contiguous territory of Canada.

"Since the date of my letter above referred to, I have received from the collector of customs at Chicago a request for instructions as to the assessment of discriminating duty, under the above provision of law, upon certain goods which came from Japan via Vancouver, British Columbia, and thence per railroad through Canada to Chicago. These goods arrived in Chicago in cars, sealed at Vancouver, British Columbia, by a United States consular officer, under regulations of the Department which are based upon the treaty of Washington, and upon section 3102 of the Revised Statutes."

You inquire, shall these goods be subjected to a special discriminating duty of 10 per cent?

An answer to your inquiry depends upon the interpretation of section 22 of the Dingley tariff bill and its effect on section 4228 of the Revised Statutes.

Section 22 is as follows:

"That a discriminating duty of ten per centum ad valorem, in addition to the duties imposed by law, shall be levied, collected, and paid on all goods, wares, or merchandise which shall be imported in vessels not of the United States, *or which being the production or manufacture of any foreign country not contiguous to the United States, shall come into the United States from such contiguous country*; but this discriminating duty shall not apply to goods, wares, or merchandise which shall be imported in vessels not of the United States, entitled at the time of such importation by treaty or convention to be entered in the ports of the United States on payment of the same duties as shall then be payable on goods, wares, and merchandise imported in vessels of the United States, *nor to such foreign products or manufactures as shall be imported from such contiguous countries in the usual course of strictly retail trade.*"

The italics are mine and indicate the affirmative changes made in preexisting laws.

Dingley Tariff Act—Discriminating Duty.

Three plausible contentions are based upon this section which, as to strength, only differ in degree.

(1) That the duty is a discrimination upon importations in vessels not of the United States, whether directly to the United States or to a contiguous country and thence to the United States.

(2) A discrimination against importations of goods (not in the usual course of strictly retail trade) from a contiguous country, they not being the products thereof. In this the character of the vessel is not important.

(3) A discrimination against goods, being the productions of a foreign country not contiguous to the United States, which shall come into the United States from a contiguous country.

In this contention the words "come into the United States" are used as designating movement only.

Under the first and second contentions the duty would not be imposed. Under the third it would be—I hence select it as a basis for consideration.

To support it it is said that the section imposes the duty in two cases: (a) when the goods are imported in vessels not of the United States and to the United States; (b) when they are the production of a country not contiguous and come into the United States from a contiguous country, the character of the vessel in which they were transported to the contiguous country being indifferent.

The first case we are not now concerned with and the second is attempted to be established by the following reasoning. The goods (which are the subject of inquiry) are Chinese or Japanese production, hence the production of a foreign country "not contiguous to the United States." They come into the United States from Canada, a contiguous country, and so it is urged that by the letter as well as by the spirit of the statute they are subject to the duty.

It is conceded that the importation is to the United States—passage through Canada being mere movement only toward destination—the latter being the United States. This being so, it would seem that there was no reason to distinguish between that importation and what may be called in distinc-

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tion a direct one—why one should be burdened and the other not burdened—when the discrimination was not necessary to the main purpose of the law. It is said that the purpose of the amendment was to relieve the American trans-continental railroads against the competition of the Canadian Pacific Railroad. It may be admitted that this is a strong consideration, but, on the other hand, it is urged that this competition is a benefit, and other American railroads claim that the Canadian Pacific is a direct advantage to them. How Congress regarded this conflict we have no means of knowing. There was certainly no avowal, and the only expressions of Members which we have indicate a different purpose than one which might or might not have been entertained, and which if it had been entertained it would seem the natural thing to have explicitly declared.

As there was no reason, therefore, why the importations—indirect or direct—should be discriminated by different duties, I am not disposed to think that it was intended. To so hold would be to put a new purpose in the law—destroying its unity—which is not compelled by its language or any mischief which we may say was in the contemplation of the lawmakers to be remedied.

The section therefore regards, as the law which preceded it regarded, the transportation of goods by sea. Its purpose was to secure this to vessels of the United States by discriminating against transportation not in them primarily to the United States, secondarily and to prevent evasion, to a contiguous country—Canada or Mexico. The necessity of it to the effectiveness of the law is obvious. Mere distance from the port of Vancouver to an American custom-house was as accidental to an importation that way as mere distance from the port of San Francisco to a New York custom-house was to an importation that way. The essential fact to be regarded was that Vancouver was not in the United States and that Canada was a contiguous country. That could be a means of evasion. It would have been useless to have imposed a discriminating duty on goods brought to San Francisco in foreign vessels and leave them free to go to Vancouver in foreign vessels and thence across the intervening land to the United States.

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The amendment of the law which is made by section 22 therefore continues its object while it strengthens and better secures it. It does this in two ways, if I may repeat—by taking away the means of its evasion through the contiguity of Canada and Mexico and by repealing the statutory exemptions from the 10 per cent duty. The special effect of this repeal I will consider hereafter.

I have considered your inquiry so far as if the section only regarded mere transportation through Canada. We shall see hereafter that it has a broader scope.

In the second contention the words “come into the United States” are used as synonymous to imported. The language “being the production or manufacture of any foreign country not contiguous to the United States” is urged only as descriptive of the goods to which the duty applies. The goods themselves, it is contended, must take their departure from the contiguous country in the strict sense of importation as distinguished from coming through it as an importation from some other country. I do not consider it necessary to detail the reasoning advanced to support this view. I have already given my interpretation of the words “come into” and that of the provision in which they are contained, and it would serve no purpose to make a circumstantial dissent from any other. I may say, however, that this view is given plausibility to by the exception that the duty shall “not apply to such foreign products or manufactures as shall be imported from such contiguous countries in the usual course of retail trade.” It is said that the words “imported in the course of strictly retail trade” indicate the rule. They are claimed to be the opposite of importation in the course of wholesale trade and that the latter must be direct, as those by retail could be no other way. But this does not follow. Such construction would confine the rule strictly to the exception, whereas it may be broader—including importations strictly so called—those which take their departure from a contiguous country if the other conditions of the rule exist. If so, the exception has an adequate and proper office. But it is not even necessary to go this far. “It is a matter of common experience that savings and exceptions are often introduced from abundant and excessive caution. And it

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would sometimes pervert the intention of the author of a writing if every other thing of the same general tenor as that excepted should be regarded as embraced in the general words." (Sutherland on Statutory Construction, sec. 222.)

It follows, therefore, that the answer to your inquiry so far as section 22 is concerned depends (1) upon the character of the vessel in which the goods were carried to Vancouver; (2) if in foreign vessels, whether the goods were entitled by treaty or convention to be entered in the ports of the United States upon the payment of the same duties as if imported in American vessels.

I assume the vessels were not of the United States, but British vessels, and this brings me to your communication of August 17, in which you inquire whether section 22 repeals sections 4228 to 4232 of the Revised Statutes, and your communication of September 2, asking whether manganese ore, imported from Chile in the British bark *Lurlie* to Philadelphia, is also subject to a discriminating duty.

A law imposing discriminating duties has been on the statute books in some form from the time of the enactment of the first tariff bill.

In the form (substantially) it maintained until section 22 was passed it was inserted in the act of May 22, 1824. Section 2 of that act was as follows:

"SEC. 2. *And be it further enacted*, That an addition of ten per centum shall be made to the several rates of duties hereby imposed upon the several articles aforesaid, which, after the said respective times for the commencement of the duties hereby imposed, shall be imported in ships or vessels not of the United States: *Provided*, That this addition shall not be applied to articles imported in ships or vessels not of the United States entitled by treaty, or by any act of Congress, to be admitted on payment of the same duties that are paid on like articles imported in ships or vessels of the United States."

This section, with unimportant verbal changes, became section 14 of the act of 1890 and section 2502 of the Revised Statutes.

In section 22 there is a change. There is omitted from it the words "by any act of Congress." Does this repeal sec-

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tion 4228? It will be observed that there are no words of express repeal. The effects of the acts of Congress are avoided, and this may not be the same as to section 4228 as to sections 4229 and 4230, which grant exemption directly to Prussian vessels. However, consideration will be simplified by a reference to contemporaneous legislation.

On the same day the Dingley bill was approved an act entitled "An act to authorize the President to suspend discriminating duties imposed on foreign vessels and commerce" was approved. I shall hereafter, for convenience, call it the suspension act. It is as follows:

"That section forty-two hundred and twenty-eight of the Revised Statutes is amended by adding to the same the following, to wit: '*Provided*, That the President is authorized to suspend in part the operation of sections forty-two hundred and nineteen and twenty-five hundred and two, so that foreign vessels from a country imposing partial discriminating tonnage duties upon American vessels, or partial discriminating import duties upon American merchandise, may enjoy in our ports the identical privileges which the same class of American vessels and merchandise may enjoy in said foreign country.'"

It will be observed that it recognizes the existence of section 4228 and amends it and enlarges the President's power. By 4228 that could only be exercised when *no* discriminating duties were imposed or laid on American vessels. The amendment provides that the power may be exercised to meet and respond to partial discriminating duties as well, reciprocating the exact privilege though less than total exemptions.

This act is somewhat confused by its references. It refers to section 2502 of the Revised Statutes. That is the same in words as section 14 of the act of 1890 (the Wilson bill), and this is expressly repealed by section 34 of the Dingley bill, while section 2502 is not mentioned, but its provisions in exact words are carried into section 22. But notwithstanding this confusion, the act does recognize the existence of and extends section 4228, and it also recognizes section 2502. What is the effect of this? The act and the Dingley bill were passed on the same day, and I do not think the order

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of passage is important if they can be reconciled. (*Crane v. Reeder*, 22 Mich., 331.) If either repeals the other, it is only by implication. There are no words of express repeal. The rule of implied repeals is well established by a long line of cases. There must be more than difference—there must be irreconcilable conflict (*Red Rock v. Henry*, 106 U. S., 596, and cases cited), and “the presumption is stronger against implied repeals where provisions supposed to conflict are in the same act or were passed at nearly the same time.” (Sutherland Statutory Construction, section 153; see also Endlich on the Interpretation of Statutes, section 45.)

Let us apply this rule.

Section 22 and section 4228 are both commercial regulations, and what the effect of section 22 would be on the other if subsequent in time and not accompanied by legislative interpretation is easily perceived to be different when contemporaneous in time and so accompanied. In *Crane v. Reeder* (*supra*) two acts passed at the same session of the legislature were under consideration. The court said, speaking by Christiancy, J.: * * * “It is not possible to ascertain with certainty which was first passed by that body [senate], nor which was first approved by the governor, though a loose inference may be drawn that the governor’s approval of the special act was communicated to the senate prior to his approval of the revision. * * * Both the revised statutes, as a whole, and the special act in question were, however, approved by the governor on the same day, May 18, 1846; and which was first actually passed by the legislature or first approved by the governor we do not deem at all material to the discovery of the legislative intent. It is sufficiently certain that both were practically under the legislative consideration at the same time, and were, properly speaking, contemporaneous acts, and should be construed as such in arriving at the intention of the legislature.”

In the case of *Payton v. Moseley* (3 Monroe), the court of appeals of Kentucky, speaking by Judge Mills, of two acts said :

“It is true, as observed by the court below, the expressions of this latter act are very broad, and if it had not passed

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at the same session with the former, it might, by the ordinary rules of construction, be held to be a repeal of the former, *pro tanto*.

“But with regard to acts of the same session, we apprehend that the rules of construction are somewhat different. When they are compared together, they ought to be construed as one act on the same subject; and the presumption of so sudden a change or revolution in the minds of the legislature ought not to be indulged. There ought to be an express repeal, or an absolute inconsistency between the two provisions, to authorize a court to say that the latter had repealed the former.”

And the supreme court of the State of California, by Judge Sanderson, in *People v. Jackson*, said of two acts claimed to conflict: “Both acts were passed upon the same day, and relate to the same subject-matter. They are, therefore, according to a well-settled rule of interpretation, to be read together, as if parts of the same act.”

Section 22 and section 4228 and amendments are not coextensive in scope; in purpose, therefore, they may be the complements of each other. One prescribes a rule, the other the condition upon which, and the agency by which, it may be suspended. Each, therefore, has its purpose—definite and consistent. Section 4228 might be a proviso to section 22 and is in effect made so by the suspension act, and as such proviso it is certainly not repugnant to section 22. The latter has its operation—commencing with its passage, continuing until the conditions of section 4228 occur, and the President acts on account of them, resuming again if the reciprocal exemptions of foreign nations be withdrawn.

Examples of this are familiar in our legislation. The provision in the Dingley bill for reciprocity of trade is such an example. Under that the duties of the act may be changed. An example not so direct, but of the same principle, is found in the case of *Russel v. Williams* (106 U. S.). It would seem from the import of language that a statute imposing duties on articles was exclusive of prior ones, regular or discriminating, whether they were imported from or were the product of one country or another. It was held, nevertheless, in

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Russel v. Williams that a discriminating duty on the products of countries east of the Cape of Good Hope, when imported from places west of it, was not repealed by subsequent acts, though not repeated in them or mentioned by them. In this case it is true there was the distinction between a commercial regulation and provisions for revenue duties, but the principle of the case is that where there is difference in purpose legislative provisions may be independent. But the rule of repeal by implication does not require us to find independence. If there is not irreconcilable conflict, the laws may exist together. As we have already seen, there is certainly no irreconcilable conflict. Even if there was more conflict in their language—more in their purpose—this would have to yield to the interpretation of the time and manner of their passage. The suspension act was reported to the House of Representatives by the same committee which reported the Dingley bill; was considered and passed while that act was in memory. It passed the Senate while the Dingley bill was pending in consideration, and was approved by the President on the same day the Dingley bill was. A knowledge of its relations to that bill and its effect on it must, therefore, be attributed to the legislature. It may be it was the later bill, for the Congressional Record shows that the President's approval of it was communicated to the Congress subsequently to that of the other.

Even a more extreme position might be taken. It was held in *Mead v. Bagnall and others* (15 Wis., 156) that "Where the provisions of a statute which relates to a particular class of cases are repugnant to those of another statute approved the same day, which is of a more general character, the former must prevail as to the particular class of cases therein referred to." (See also Endlich on the Interpretation of Statutes, sec. 216, and cases cited.)

It follows, therefore, that section 4228 was not repealed by section 22, and that the merchandise of both inquiries is not to be subjected to a discriminating duty.

Respectfully,

JOSEPH McKENNA.

The SECRETARY OF THE TREASURY.

Galveston Harbor.

GALVESTON HARBOR.

Under the contract for the improvement of Galveston Harbor, the railway to be built upon trestlework following the line of the jetty must be at the expense of the Government, whether it is the case of original construction or extension.

The Government must bear the expense of maintaining the railway upon the original work and upon the extension, after the suspension of operations upon these respectively.

DEPARTMENT OF JUSTICE,

November 15, 1897.

SIR: On May 12, 1891, the Government entered into a contract with O'Connor, Laing & Smoot for improving the entrance to Galveston Harbor, Texas, wherein it was agreed:

"That the said O'Connor, Laing & Smoot shall construct the railway and trestle and furnish and place the sandstone, riprap, and granite blocks required for the construction and maintenance of the north and south jetties for improving the entrance to Galveston Harbor, Texas, and also for the extension of the same to any required distance beyond the outer crest of the bar, but not beyond the contour of thirty-foot depth in the Gulf of Mexico."

Among the specifications which are attached to and form a part of the contract are the following:

"1. *General outline of work.*—The plan of the works contemplates the construction of two jetties, one on the south side and one on the north side of the entrance to Galveston Harbor. The south jetty has been partially constructed by the Government, taking its origin near the junction of Ninth street and Avenue A, at the east end of the city of Galveston, and extending out to the crest of the bar in the Gulf of Mexico, which obstructs the entrance to Galveston Harbor. This jetty has a present total length of about six miles. It has been completed for a length of nearly four miles, of which nearly two miles constitute the shore branch, commencing near the junction of Avenue A and Ninth street, as noted above, and the remainder being the jetty proper, extending out into the Gulf. * * * It is proposed to complete this jetty, * * * and to build the north jetty * * * and to maintain both jetties for a period of five years after construction * * *

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"2. *General method of construction.*—A railway of standard guage will first be constructed upon trestlework following the line of the jetty. The material will then be deposited about and between the piles." * * *

"5. *Railway.*—The railway is to be of standard guage, its axis to coincide in plan with the axis of the jetty. * * * They (the rails) are to be carried upon trestlework constructed as follows: Bents of piling will be driven fifteen feet from centre to centre; each bent capped with a piece of 12-inch by 12-inch timber, ten (10) feet long. * * * Upon the caps will be placed two twelve-inch by fourteen-inch stringers, upon which the rails will be laid. * * * Additional strength will be given to the trestle when required, the additional amount paid therefor to be the actual additional cost to the contractor."

"9. *Use of railway.*—During the period of the contract the contractor will be allowed the use of the railway now existing upon the completed portion of the south jetty, and of that built under this contract, for the purpose of transporting the material to be delivered by him, and he will be required to keep the track and trestle in good repair, but should extraordinary damage occur from storms the repairs will be the subject of special adjudication; and the decision of the engineer officer in charge as to what constitutes extraordinary damage, and what portion thereof should be borne by the contractor, shall be final. All temporary side tracks and switches must be provided by the contractor at his own expense."

"14. *Extent of the works.*—The exact distance out in the Gulf to which it will be necessary to carry the jetties can not be determined in advance, but it will not fall short of the outer crest of the bar, nor will it extend beyond the contour of the thirty-foot depth outside the bar. The United States reserves the right to suspend operations upon either or both of the jetties at any point between these two limits, and the work shall then, for the purpose of releasing the percentage referred to in specification 21, be considered complete, and further operations shall then consist in maintaining the works in good condition and in extending them further into

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the Gulf, should the engineer officer in charge think proper to make such extension at any time within five years after this suspension of work." * * *

Specification 15 required prices to be given separately for each of the thirteen items, twelve being for blocks of stone or concrete, of different weights and locations per ton, and the thirteenth for the "railway, including trestles and rails complete and ready for service, per linear foot." Under each item the price bid was to cover the cost of all labor required to put the material in place.

"18. *Maintenance*.—The works will not be considered completed until they shall have been maintained a period of five years after their construction. Whenever repairs become necessary, the engineer officer in charge shall notify the contractor of the character and approximate quantity of the materials required, and the contractor shall, within thirty days from the date of such notification, begin the delivery of the materials, and shall push the work of repair with diligence. The prices paid for materials used in maintenance will be the same as those for the original work and the terms of payment will be the same, except that there shall be no retained percentage.

"19. *Extension of jetties*.—Should it be necessary, in the opinion of the engineer officer in charge, at any time within the five years after the original construction of the jetties, to extend them further into the Gulf, the contractor shall begin such extension within sixty days from the date of notification, and all of the terms and conditions which governed the original work shall apply to such extension, but the contractor will not be required to maintain such extensions for a period beyond the termination of the five years during which he is required to maintain the original works."

"21. *Payments*.—At the end of each calendar month, or as soon thereafter as the necessary formalities can be complied with, payment will be made for work accomplished during the month, less ten per cent of its contract price. The retained per cent does not become due until the completion of the works." * * *

Galveston Harbor.

After inviting my attention to the above contract, in your communication of August 10, you submit the following question for my opinion:

"There is a proposition pending in the War Department to enter into supplementary contract to relieve the contractors from the maintenance for five years of the jetties as originally constructed. It is said that, if it is the duty of the United States to pay for the necessary repairs that are to be made on the railroad situated on the works during the five years the works are to be maintained after being completed, it would be to the interest of the United States to enter into the supplementary contract referred to, but that if under the contract it is the duty of the contractors to make said repairs at their own expense, it would not be to the interest of the United States to enter into such supplementary contract, and in this way the question has arisen, and as before stated is now pending, which it is necessary to have decided before further action can be taken on the proposition to enter into the proposed supplementary contract. This question is, whether under the said contract of May 12, 1891, the United States or the contractors should bear the cost of maintaining the railway upon the original work, and upon its extension, after the suspension upon these, respectively."

At the time the contract was entered into, the south jetty had been partially constructed by the Government, having then a total length of 6 miles, of which 4 miles had been completed, 2 miles constituting the shore branch and the remainder being the jetty proper extending out into the Gulf. It was proposed by the contract to complete this jetty, to build the north jetty, and to maintain both jetties for a period of five years after construction (spec. 1). In building the jetties, the Government reserved the right to suspend work after the jetties should reach a certain point, and then, if thought necessary, to direct their extension at any time within five years after such suspension (spec. 14). So the contract provided for three things: First, the work of original construction to a point between the outer crest of the bar and the 30-foot depth outside the bar (spec. 14); second, the maintenance of these works for a period of five years after the

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work of original construction should be suspended (spec. 18); third, the extension of the jetties farther into the Gulf, should that be deemed necessary (spec. 19).

In constructing the works provided for, the contractor was required, first, to build a railway of standard gauge upon trestlework following the line of the jetty. The material was then to be deposited about and between the piles (spec. 2), the railway becoming, as it were, the backbone of the jetty. For the railway in place the contractor was to receive so much a linear foot; for the stone and concrete blocks so much a ton. Of the contract price for both railway and stone work 10 per cent was to be retained until the completion of the works. (Spec. 21.)

There is no dispute that, in the case of original construction, and in the case of extension, the Government must bear the expense of building the railway as a part of the works which become the property of the United States. Is this true with respect to maintenance under specification 18? Specification 14, wherein the Government reserves the right, after the jetties shall have been carried a certain distance out in the Gulf, to suspend operations, provides that, for the purpose of releasing the retained 10 per cent under specification 21, the work shall be considered complete, "and further operations shall then consist in maintaining the works in good condition and in extending them farther into the Gulf," should the Government so require. What was to be extended farther into the Gulf, should the Government so require? Unquestionably, the railway and the jetty built under and about it, constituting "the works." What was to be maintained, should the Government not require any extension? Obviously the same thing—"the works," both railway and jetty, or, if you please to put it so, the jetty, including the railway. In specification 19, providing for the extension of the jetties, the works required to be maintained are described as "such extensions;" the thing extended is railway and jetty, and the same thing, the extension, must be maintained under this specification.

At whose expense is this to be done? In specification 18 it is provided that "*the works*" will not be considered completed until they shall have been maintained a period of five

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years after their construction." These are not different from "the works" referred to in specification 14—works which have been constructed, and might be extended, and must be maintained. For maintenance, the contractor is to be paid the same prices as for original construction, the language of the contract being, "The prices paid for materials used in maintenance will be the same as those for the original work." In the case of original work materials in place alone were paid for—completed railway at so much a foot, stone and concrete in place at so much a ton, these prices covering all labor required. (Spec. 15.) If in maintaining the railway it does not become necessary to rebuild any part of it, there is provision for giving additional strength at a price to be measured by the actual additional cost to the contractor. (Spec. 5.)

The doubt as to the proper construction of the contract referred to in your question is evidently due largely to the apparent requirement in specification 9, that the contractor shall keep the railway in repair "during the period of the contract," but what this specification really provides, as a careful reading shows, is that the contractor will be allowed the use of the railway during said period. He is allowed the use, not only of the railway built by him under the contract, but of that "now existing upon the completed part of the south jetty," and this privilege is granted upon the condition that he "keep the track and trestle in good repair," extraordinary damage from storms excepted. The obligation to keep in repair is not therefore consequent to the construction of the railway, but accompanies and flows from its *use*. The railway, that already constructed and that to be constructed, becomes a part of the permanent works belonging to the United States; so the Government permits its use on condition that the contractor shall keep it in good repair. The exception of extraordinary damage from storms strengthens the conclusion that the damage to be made good by the contractor is that which occurs while the railway is being used by him, attributable to causes for which he may fairly be held responsible.

The railway and trestle were to be built first, the stone and concrete placed under and about it to complete the jetty.

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The railway thus built is incorporated into and becomes a part of the jetty. The provision for maintenance at the expense of the Government takes cognizance of the fact that the action of the elements will probably damage and partially destroy the work of the contractor. The same causes which damage and partially destroy the stonework will, in all likelihood, at the same time damage and partially destroy the railway. Why pay the contractor for maintaining the stonework and not pay him for maintaining the railway? In neither case is he responsible for the damage; in each the elements alone are to blame. The prices for maintenance are those provided for original construction. The price for stonework in original construction was not put at a figure to cover the cost of building a railway to deliver it in place. The railway was paid for separately. If the price for stone in original work did not cover the cost of building the railway, neither will the price of stone in maintenance cover the cost of rebuilding and maintaining it.

Answering your question, I am therefore of the opinion that the railway built under this contract becomes a part of the works belonging to the United States, and that the Government must bear the expense of maintaining it upon the original work and upon the extension after the suspension of operations upon these respectively.

It appears that early in 1895, about two years after work had been suspended on the south jetty, the War Department ordered an extension of the jetty further into the gulf. To enable the contractor to proceed with the work of extension, the Government paid him for repairing and in part rebuilding the railway on the south jetty. There was no authority for this expenditure, if the contract requires the contractor to bear the expense of maintaining the railway for five years after the suspension of the original work. The action amounted to a departmental construction of the contract in line with the conclusions reached in this opinion.

Very respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOSEPH MCKENNA.

The SECRETARY OF WAR.

Chinese.

CHINESE.

Certain Chinese persons of alleged American birth who entered the United States were deported to Canada, but subsequently returned to the United States: *Held*, the Collector of Customs has the right to enforce his exclusion by again returning them to Canada.

DEPARTMENT OF JUSTICE,

November 19, 1897.

SIR: I have the honor to acknowledge the receipt of your letter of November 11, in which you transmit a copy of a letter dated November 5, with its inclosures, received by you from the collector of customs for the port of Burlington, Vt., in relation to the admission of Chinese persons to this country. From the collector's letter it appears that ten Chinese persons of alleged American birth entered his district and were at once returned by him to Canada, and that these ten Chinese have again presented themselves in his district. The collector questions his authority to again deport them, and before answering the collector's letter you desire an expression of my views upon the subject.

By the act of August 18, 1894, chapter 301, paragraph 6 (2 Supp. R. S., 253), it is provided that—

“In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury.”

In the case of *Lem Moon Sing v. United States* (158 U. S., 538, 548) the Supreme Court, in commenting upon this act, say:

“But by the act of 1894 the decision of the appropriate immigration or customs officers excluding an alien ‘from admission into the United States under any law or treaty’ is made final in every case, unless, on appeal to the Secretary of the Treasury, it be reversed.”

And the court add that they do not express any opinion on the question whether in the case before them the applicant was entitled of right under some law or treaty to reenter the United States, but decide that that question has been

Chinese.

constitutionally committed by Congress to the named officers of an executive department of the Government for final determination. There is no reason to doubt that this decision is applicable to an applicant seeking to *enter* the United States under claim of right, as well as to reenter.

To hold that Chinese persons, after being excluded by a collector of customs at a frontier port under the authority of the above act and decision, may again return to this country and appear in the collector's district, claiming that he has no further jurisdiction over them, will be to set at naught the plain provision of the act of August 18, 1894, and the determination of the Supreme Court regarding it. I am therefore of the opinion that the collector of customs at Burlington has the right to enforce his exclusion as to the Chinese persons in question, being in his district, by returning them to Canada.

Very respectfully,

JOSEPH MCKENNA.

The SECRETARY OF THE TREASURY.

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* See Index to Subjects, p. xvii.

ACTIONS—Continued.

2. When such third persons fail to sue until the period of the statute of limitations of the State has expired, they are barred by their laches from suing thereafter. That they had meanwhile been applying to Congress for relief is immaterial. *Ib.*
3. The Attorney-General should not institute for the benefit of private parties a suit to vacate or reform a United States land patent unless there is a reasonable ground to believe that it will be sustained by the court, or except for a wrong which private litigation could not remedy. *Ib.*
4. The United States does not suffer itself to be sued without its consent. 18.
5. Public property can be subject to claims against it only when it is in the possession of the courts by act of the Government seeking to have its rights established. *Ib.*
6. As a recourse to law for the settlement or collection of certain bonds issued by certain States and owned by the United States would involve the grave act of suing a State, the Secretary of the Treasury is advised not to institute suit. 478.
7. One may proceed on the same cause of action against the same defendants in as many different jurisdictions as he can have service of process executed upon the defendants. 447.
8. One final judgment on the merits rendered in one action can be pleaded in bar in all others upon the same cause of action. *Ib.*
9. The appearance of parties to a suit in one jurisdiction does not operate as an abandonment of proceedings instituted by them in another jurisdiction, the parties to the cause of action being the same. *Ib.*

ADVERTISEMENTS.

1. All purchases and contracts for supplies in any of the departments of the Government must be made after advertisement, unless immediate delivery of the articles is necessary. 59.
2. The first two sentences of section 3709, Revised Statutes, as amended apply to purchases anywhere in the United States, while the remaining three sentences apply only to purchases in the city of Washington. *Ib.*
3. Revised Statutes, section 3709, prohibiting the purchase of supplies except after advertisement, does not apply to paper and materials for the Government Printing Office, and the acts amendatory thereof enlarge it in respect to this office only so as to apply to fuel, ice, stationery, and miscellaneous supplies. 137.
4. The purchases to be made by the Public Printer as contemplated by the act of January 12, 1895, are paper and materials for printing and binding public documents and such as do not come within section 3709, Revised Statutes. *Ib.*
5. Under sections 3709 and 3718, supplies of every name and nature for the Navy are to be purchased by contract upon advertisements, except in cases when the public exigency will not permit of delay, and then by open purchase as between individuals. 181.

ADVERTISEMENTS—Continued.

6. The act of January 12, 1895, transfers the authority to contract for envelopes to the Postmaster-General; and this act must be construed in *pari materia* with sections 3709 and 3733, Revised Statutes. *Ib.*
7. Contracts for the purchase of seals by the United States, used to secure packages while being transported in bond, must be awarded upon advertisement. 304.
8. Advertisements for proposals in accordance with the provisions of section 3709, Revised Statutes, are not required for supplies or services for the Columbia Institution for the Deaf and Dumb. 349.
9. The Maxim-Nordenfelt Company contracts to furnish the Navy Department 100 guns. By a supplemental agreement provision is made for the manufacture of the guns at the Naval Gun Factory in Washington and for ascertaining the remuneration ultimately to be paid the Maxim Company: *Held*, That this is a contract for ordnance and another contract may be made by the Department with the American Ordnance Company for the manufacture and delivery of any of said guns under the contract and agreement with the Maxim-Nordenfelt Company without submitting the matter to competition by public advertisement. 577.
10. It is competent for the Secretary of State to prohibit the publication in the Monthly Bulletin of the Bureau of American Republics of advertisements of private firms or corporations. 514.
11. The bulletins containing such advertisements may be sent through the mail free of postage. *Ib.*
12. It is not necessary under existing law for the Secretary of the Treasury to advertise in six newspapers published in the District of Columbia for proposals for the interior finish of the post-office building in the city of Washington. 595.
13. The selection of newspapers in which to publish advertisements of this character in the District of Columbia is in the discretion of the head of the Department. *Ib.*
14. The advertisements in *Le Petit Journal*, a French publication, considered and held to fall within the prohibited class defined in section 3894, Revised Statutes, as amended by the act of September 19, 1890, and therefore unavailable. 171.
See BIDS, 6.

AGENT.

The authority to collect drawbacks may be delegated by a manufacturer to a general selling agent or to some attorney at law, but such a person must conduct his business through a licensed broker unless he obtains himself a license. 255.

See WORDS AND PHRASES.

ALIENS.

See CITIZENSHIP; IMMIGRANTS; VESSELS, 4.

AMERICAN REGISTRY.

1. The British steamship *Southery* was wrecked outside of the limits of the United States, abandoned, turned over to the underwriters, and finally towed to New York, where she sank in or near Erie Basin. She was repaired and purchased by an American citizen at three times the cost of the wreck: *Held*. The vessel was wrecked in the United States within the meaning of Revised Statutes, section 4136. 143.
2. The word "cost" in said section is to be construed liberally, and if the actual cost of the repairs is three times the actual purchase price of the wreck, then she is entitled to registry. *Ib*.
3. The Secretary of the Treasury was justified in denying the application for registry of the vessel *Southery* under this section, in view of the narrow construction placed upon the clause "wrecked in the United States." 198.
4. If any of the injuries which have made a vessel a wreck were received in the United States, in the absence of bad faith she should be held to come within the clause "wrecked in the United States," although others had been received elsewhere. *Ib*.
5. The word "wreck" in section 4136, Revised Statutes, must be taken in a very comprehensive sense as applicable to a vessel which is disabled and rendered unfit for navigation, whether this state of the vessel has been caused by the winds or the waves, by stranding, fire, explosion of boilers, or by any other casualty. *Ib*.

AMERICAN REPUBLICS.

See BUREAU OF AMERICAN REPUBLICS.

ANIMALS, DISEASED.

See CATTLE.

APPOINTMENTS AND REMOVALS.

1. The President can appoint to office only those who are eligible under the Constitution. His appointment of one not eligible is a nullity. 211.
2. The sole responsibility of every appointment in an executive department rests upon the head of that department, except where otherwise specially provided by statute. 355.
3. The power of appointment and removal in an executive department being discretionary in character, they can not be delegated. *Ib*.

See CIVIL SERVICE; NAVAL ACADEMY, 1-4.

APPROPRIATIONS.

1. The question out of which appropriation certain expenses of the Department of Agriculture should be paid is one which should be addressed to the Comptroller of the Treasury. 221.
2. So should the question whether or not the appropriation act of 1896 authorizes the Secretary of the Treasury to purchase newspapers and other articles for use outside of Washington. 178.

APPROPRIATIONS—Continued.

3. The allotment of the Public Printer's appropriation among the different departments is not actually passed upon by the accounting officers of the Treasury, and is not within their jurisdiction. 423.
4. No authority exists in the Secretary of the Navy to incur obligations for the completion of a dry dock where the appropriation has become exhausted, although it would result in a great saving to the Government. 288.
5. The object of sections 3732, 3733, and 5503 is to prevent executive officers from involving the Government in expenditures or liabilities beyond those contemplated and authorized by the law-making power. 244.
6. N. notified the Secretary of War that it elects to carry on the work of dredging in the Mobile Harbor under its contract, if the appropriation is exhausted, without waiting for an appropriation by Congress to pay for it, and asks the Secretary of War to supervise the same: *Held*, That he is without authority to continue the employment of the contractors, and that the work which they propose to do does not come within their contract and that he can not supervise it. *Ib.*
7. The appropriation for special speed premiums made by the act of July 26, 1894, is not limited in its application to premiums earned prior to January 1, 1894. 84.
8. Under section 5 of the river and harbor act of June 3, 1896, which limits the amount that the Secretary of War can obligate the Government for in any fiscal year to \$100,000, the contractor may perform in one year the work for which the contract allows him three years, and although he may earn a larger sum than this amount he may not receive full payment therefor under three years. 379.
9. Where the total amount authorized to be expended is less than \$400,000, contractors may be allowed to earn the amounts authorized to be expended in advance of the appropriation by Congress for such work. *Ib.*
10. The river and harbor act of June 3, 1893, making an appropriation for the protection of the east bank of the Mississippi River opposite the mouth of the Missouri River, leaves it to the discretion of the Secretary of War whether he shall make such expenditure or not. 391.
11. The river and harbor act of June 3, 1896, made a lump appropriation for certain improvements on the Mississippi River, while the proviso thereto specified "that the sum hereby appropriated" shall be expended for improvements at Greenville, Helena, and New Madrid: *Held*, That the sums specified in the proviso are chargeable to the specific appropriation set forth in the body of the act. 414.
12. The direction to expend the sums mentioned in the proviso to this act is not mandatory to the extent that the full amount must be expended if the work can be done for less, or to pro-

APPROPRIATIONS—Continued.

ceed with it at all contrary to the recommendation of the Mississippi River Commission, whose recommendations are to be considered. *Ib.*

13. If the appropriations made for river and harbor improvements by the act of June 3, 1896, should not be expended, the work could at a subsequent time be contracted for by the Secretary of War under a provision in said act for such additional contracts as may be necessary to carry on continuously the plans for the work. *Ib.*
14. The specific appropriations in this act, if not used for the particular work designated by Congress, can not be used for any other purpose. *Ib.*
15. The various provisions in the river and harbor act of June 3, 1896, that contracts "may be" entered into by the Secretary of War for the completion of certain improvements, to be paid for out of future appropriations, are not mandatory, but discretionary; and he may decline to make contracts in all cases where he is convinced that the public interests will not be subserved by making them. 420.

See CLAIMS, 3, 4; DAMAGES; SEEDS, 1-3, 5, 6.

ARBITRATOR.

See CONSULAR OFFICERS, 2.

ARKANSAS.

Certain interest-bearing bonds of the State of Arkansas held not to bear interest after maturity. 135.

ARMS.

See NATIONAL GUARD.

ARMY.

1. The troops of the United States can not be employed in the Indian Territory for the purpose of assisting in the preservation of peace and the arrest of bandits and outlaws unless they are trespassing upon Indian country, or absconding offenders within the provisions of section 2152, Revised Statutes. 72.
2. A "municipal ordinance" is comprehended by the phrase "laws of the land" as used in the fifty-ninth article of war, and a soldier violating such an ordinance and escaping to a military reservation should be surrendered to the civil authorities for trial upon demand. 38.
3. A soldier should not be held accountable for money paid him in excess of the amount to which he was entitled where such payment was made through a mistake of law on the part of the executive officers of the Government. 323.
4. A convicted deserter from the Army undergoing sentence must become the recipient of Executive clemency and make application for reenlistment before the question of the effect of the President's pardon upon his right to reenlist can arise. 568.

See ACCOUNTS, 2, 3; ARMY OFFICERS.

ARMY OFFICERS.

1. The Fifty-eighth Pennsylvania Regiment of Militia was not in the military service of the United States in such sense as to entitle Capt. Frederick Huidekoper to a certificate of discharge from the United States. 130.
2. The phrase "he shall be retired with the rank to which his seniority entitled him to be promoted," under section 3 of the act of October 1, 1890, is not a mandatory provision for the retirement of the disabled officer, but for the purpose of fixing the rank with which he should be retired. 385.
3. No officer can be retired from the Army upon the report of any board, even if approved by the Secretary of War, except it is also approved by the President. *Ib.*
4. An examination of a lieutenant of the Army for promotion, which results in a finding by the examining board of incapacity for active service on account of physical disabilities, and which is approved by the proper military authorities but not by the President, was not such an examination as is required by law for the retirement of an officer from the active service. *Ib.*
5. Upon the removal of such physical disability a reexamination may be allowed by the Secretary of War. *Ib.*
6. The President has authority to assign enlisted men of the Army who have passed the examination as candidates for commission to vacancies that may exist in any corps or arm of the service in which they have been commissioned, notwithstanding the fact that additional second lieutenants remained in other corps unassigned. 491.
7. The question as to whether a retired officer is eligible to hold certain diplomatic or consular appointments without affecting his position on the retired list, with rank and pay, is one of private concern only and not a subject with which the United States can be interested until some action has been taken by such officer. 510.
8. Officers who served during the rebellion as volunteers in the Army of the United States and have been honorably mustered out are entitled to bear the official title and upon occasions of ceremony wear the uniform of the highest grade they have held in the volunteer service. 579.

See ARMY; PENSIONS, 1, 2; TAXATION, 8, 9.

ARREST.

See ARMY, 1.

ASSIGNMENTS.

An assignment of an indebtedness admittedly due by the United States is not prohibited by section 3477, Revised Statutes. 75.

ATTORNEY-GENERAL.

1. A question once fully considered and answered by one Attorney-General can not with propriety be reconsidered by his successor, unless in some extraordinary case. 23, 264.

ATTORNEY-GENERAL—Continued.

30. The question whether or not the Secretary of the Treasury is authorized by the appropriation act for the fiscal year 1896 to purchase newspapers and other articles for use outside of Washington, in view of sections 192 and 3683, Revised Statutes, belongs to a class of questions which should be submitted to the Comptroller of the Treasury, except in matters of great importance, as under the act of July 31, 1894, his opinion is a complete protection. 178.
31. A question affecting all the Executive Departments is answered by the Attorney-General, as it falls within the exception to the rule that his opinion should not be rendered upon questions which, under section 8 of the act of July 31, 1894, can be referred to the Comptroller for decision, except in matters of great importance, inasmuch as a conflict of precedents might arise. 181.
32. An opinion which could have been asked of the Comptroller of the Treasury is, notwithstanding, given by the Attorney-General, it appearing that the question is one of importance and the Comptroller joins in requesting it. 224.
33. The question as to the right to refund certain duties claimed to have been collected through mistake of law should be asked of the Comptroller of the Treasury. 188.
34. A request for an opinion of the Comptroller of the Treasury is referred by him to the Attorney-General and is furnished by the latter, as the question is an important one. 402.
35. The Attorney-General will not pass upon the question to what appropriation a certain expenditure should be charged, as it is one which should more properly be submitted to the Comptroller of the Treasury. 405.
36. On questions of disbursement of money or payment of claims, which are by law relegated to the Comptroller, the Attorney-General should not render an opinion. 530.
37. An expression in an opinion of the Attorney-General which is merely obiter does not have the force and effect of an official opinion. 25.
38. Weight of evidence and credibility of witnesses are not questions to be considered in rendering an opinion. 58.
39. The Attorney-General is not at liberty to comply with a request for a further consideration and opinion upon the residence of M., a civil-service employee, as it would involve consideration and decision upon conflicting evidence. *Id.*
40. Certain steamship companies dispute the validity of the regulations of the Treasury Department holding them liable for the maintenance and transportation to the seaboard, under the act of March 3, 1891, of certain alien immigrants who had reached the interior of the country: *Held*, That the enforcement of the regulation is the duty of the Department of Justice and the opinion of the Attorney-General can not be required thereon. 6.

ATTORNEY-GENERAL—Continued.

41. The Attorney-General should not institute, for the benefit of private parties, a suit to vacate or reform a United States land patent unless there is reasonable ground to believe that it will be sustained by the court or where it is for a wrong which private litigation could not remedy. 13.
42. Third persons claiming title to land patented in California under the act of March 3, 1851, may bring a suit to declare a trust in said lands. Such suit may be brought in the State courts and without the aid of the Attorney-General. The decisions of a State court upon such a suit unappealed from binds the parties thereto, whether righteous or erroneous. *Ib.*
43. The question of how far the judgment of a court is void for want of jurisdiction should be deferred until actually presented for decision in the case in which one of the parties to such judgment shall be a party. 37.
44. The Attorney-General will not give an opinion upon a judicial question not arising in the administration of a department within the meaning of section 356, Revised Statutes. 369.
45. The question whether or not a civil action or criminal prosecution could be commenced relative to lands found to have been erroneously patented under the Western Pacific Railroad grant in California is not one upon which the Attorney-General can give a legal opinion to the head of another department. 509.
46. As to whether or not the statute of limitations did or did not bar a claim on behalf of the Government is a judicial question to be determined by the courts and not by the Attorney-General. 557.
47. The Attorney-General will not give an official opinion upon the question whether certain plates and cuts used for making sketches and pictures of foreign postage stamps come within the terms of the act of May 16, 1884, and the act of February 10, 1891 (except section 4), prohibiting counterfeiting, because they relate only to criminal proceedings. 133.
48. Whether or not an act constitutes a crime is a question that in but rare instances can arise except in the Department of Justice. *Ib.*
49. Whether or not certain material or apparatus come within the scope of section 4 of the act of 1891 is a question of fact, and an opinion can not be given thereon. *Ib.*
50. A question involving the construction or application of a customs regulation which is subject to modification at any time is not a proper one upon which the Attorney-General should give an opinion. 255.
51. The existence of a usage affecting the legal definition of a statutory term is a question of fact upon which the Attorney-General will not give an opinion. *Ib.*
52. The Attorney-General can not undertake to give a general definition of the words applicable to all cases arising. 109.

AUDITORS OF THE TREASURY.

They are agents of the Government in the broad sense of the term but are more properly called officers, and were not intended to be included within the meaning of the word "agent" in section 3469, Revised Statutes. 361.

BALTIMORE POST-OFFICE.

Certain removals of superintendents and clerks in the Baltimore post-office and the appointment of their successors held to be legal. 140.

BANKS AND BANKING LAWS.

The proposed issue of interest-bearing bonds by the county commissioners of Floyd County, Ga., will not be in conflict with the banking laws of the United States. 70.

See **TAXATION**, 3-6.

BERING SEA AWARD ACT.

See **SEAL FISHERIES**, 2-9.

BIDS.

1. The Secretary of the Navy is obliged to award contracts for supplies to the lowest bidder who complies with the requirements as to security, etc., although the Secretary is the person charged with the duty of ascertaining the facts in this regard, and his decision is not reviewable by any court. 56.
2. In the absence of any special statutory provision, a bidder may withdraw his bid at any moment until notice of acceptance thereof. *Ib.*
3. In case of a failure to accept the lowest bidder in a contract for naval supplies, it is not necessarily the duty of the Secretary to award the contract to the next lowest bidder. *Ib.*
4. If a bid for the construction of public works has been accepted, it can not be withdrawn by the contractor because he made a clerical error in preparing his estimates, as the mistake was not mutual, but was due to negligence. 186.
5. It is within the authority of the Secretary of War to waive informalities in the submission of bids and the written guaranty accompanying the same, and in specific cases to waive formal defects, both in the bids and bonds. 469.
purpose. *Ib.*
6. There is nothing in section 3709, Revised Statutes, providing for advertisements for public supplies, as amended, inconsistent with the legal right of the board of award of the Department of Agriculture to consider any bid received by them through the mail after the hour of 2 o'clock p. m. 546.
7. The statutory designation of 2 o'clock p. m. for the opening of all proposals in each department means only that such proposals shall not be opened before 2 o'clock p. m. thus securing to both the Government and the bidders the advantage of the prescribed moment prior to which no bids can be opened. *Ib.*

BIDS—Continued.

8. A proposal received after 2 o'clock p. m. under circumstances which warrant the belief that it had been prepared and submitted in the light of the proposals submitted by other bidders, which had already been opened and made known, should not be received or entertained; but a proposal received under conditions which precluded the possibility of such inference should not be rejected because it happens to be received by the board of award a few minutes after 2 o'clock p. m. *Ib.*

See ADVERTISEMENTS; BONDS, 4; CONTRACTS, 7; MILITARY ACADEMY, ETC., 1.

BOARD OF GENERAL APPRAISERS.

See CUSTOMS LAWS AND REGULATIONS, 11-14.

BOARD OF SUPERVISING INSPECTORS OF STEAM VESSELS.

See NAVIGATION RULES, 3.

BONDED WAREHOUSES.

See CUSTOMS LAWS AND REGULATIONS, 15-25.

BONDS.

1. The proposed issue of interest-bearing bonds by the county commissioners of Floyd County, Ga., will not be in conflict with the banking laws of the United States. 70.
2. Certain interest-bearing bonds of the State of Arkansas held not to bear interest after maturity. 135.
3. United States district attorneys are not required or authorized to make the examination into the sufficiency of the sureties on official bonds required by section 5 of the act of March 2, 1895. 154.
4. A bond accompanying a bid for certain public works which is on printed blanks bound together and consecutively paged in print is not sufficiently defective to make it invalid because the date of the bid and that of the bond were not inserted in the blanks left for that purpose. *Ib.*
5. As a recourse to law for the settlement or collection of certain bonds issued by certain States and owned by the United States would involve the grave act of suing a State, the Secretary of the Treasury is advised not to institute suit. 478.

See BIDS, 5.

BRIDGES.

The action of a State with reference to the rights of parties among themselves concerning the construction of a bridge does not affect the interests of the United States so long as the directions of the Secretary of War concerning the location and plan of the bridge are respected. 293.

See NAVIGABLE WATERS, 1, 3, 9, 10.

BRIG "GENERAL ARMSTRONG."

See CLAIMS, 3, 4.

BUREAU OF AMERICAN REPUBLICS.

1. The Monthly Bulletin, containing advertisements of private firms or corporations, published by the Bureau of American Republics, is entitled to transmission through the mails free of postage, under the act of February 20, 1897. 514.
2. It is competent for the Secretary of State to prohibit the publication in the Monthly Bulletin of the Bureau of American Republics of advertisements of private firms or corporations. *Ib.*

BUREAU OF ENGRAVING AND PRINTING.

See ABSENCE, LEAVES OF, 2.

CALIFORNIA DÉBRIS COMMISSION.

1. The California Débris Commission may take the necessary steps to prevent injury to the navigability of a river by operation of hydraulic mining within the territory of the jurisdiction of the commission and resort to the remedy of injunction on a bill in equity in the name of the United States. 10.
2. The North Bloomfield Gravel Mining Company is within the jurisdiction of the California Débris Commission. 62.
3. The California Débris Commission may resort to a court of equity for the purpose of obtaining authority to make an inspection of the premises where hydraulic mining is being or supposed to be unlawfully conducted, and pray for an injunction to restrain the mining during the time the commission is excluded. *Ib.*

CANNED MEAT.

See MEAT INSPECTION, 1.

CAPITATION TAX.

See TAXATION, 2.

CARTAGE CHARGES.

See CUSTOMS LAWS AND REGULATIONS, 14.

CATTLE.

1. The act of August 30, 1890, provides a summary method of appraisal and payment in case of the slaughter of animals exposed to infection, but no payment is provided where they are imported in violation of the act. The evident intent of the act was that exposed animals imported in violation thereof were to be slaughtered indiscriminately, without regard to the question of the legality of the importation. 460.
2. The authority of the Department of Agriculture to seize and slaughter imported sheep affected with scab under that act is doubtful. *Ib.*

See MEAT INSPECTION; QUARANTINE, ETC.

CENTRAL PACIFIC RAILROAD COMPANY.

1. The language of the Thurman Act, section 8, with reference to the Pacific Railroad companies, does not create a lien on the sinking fund prior to that of the United States in favor of the first-mortgage bondholders. 104.

CENTRAL PACIFIC RAILROAD COMPANY—Continued.

2. The entire sinking fund belonging to the Central Pacific, or its proceeds, may, if necessary, be used to pay the indebtedness of the Central Pacific to the United States maturing in January, 1885. *Ib.*
3. A demand upon the railroad companies is not necessary to fix its liability to reimburse the United States for all sums paid by the latter on account of principal and interest of subsidy bonds. *Ib.*
4. The acts of July 1, 1862, and July 2, 1864, with reference to the Central Pacific Railroad Company, construed in the light of the act of May 7, 1878, and sundry decisions of the Supreme Court: *Held*, That the one-half of the earnings of the company on Government business and its yearly payments of 5 per cent of its net profits can not be treated as having liquidated the whole or any part of the company's indebtedness on account of the principal of the subsidy bonds maturing January 16, 1895; but, on the other hand, must be regarded as paying interest debts exclusively. *Held further*, Applying the familiar rule that in case of payments by a debtor to a creditor upon distinct transactions for distinct accounts, when neither party makes an appropriation at the time, the payments are applied by law to the liabilities of earliest date; that the sums applicable in any one year to the payment of the company's interest debts for that year must be applied in the order in which such debts arise, and the fact that bonds have been issued at various times is of no consequence. 145.

CHICAGO RIVER.

See RIVERS AND HARBORS, 4.

CHINESE.

1. A Chinese person is not a merchant within the meaning of section 2 of the act of March 3, 1893, unless he conducts his business either in his own name or in a firm name of which his own is a part. 5.
2. The requirements of the act of July 5, 1884, with reference to the admission of Chinese to this country should be strictly complied with by the applicants for admission. 6.
3. The Secretary of the Treasury, under the act of May 5, 1892, may authorize the landing and detention at a port within the United States of Chinese sentenced to deportation, until the vessel returns to such port and is ready to proceed to China. 18.
4. The third paragraph of section 2 of the act of November 3, 1893, is to be regarded as wholly prospective in its operations and as applying exclusively to Chinese merchants who both came into the United States for the first time since November 3, 1893, and, having carried on business here, afterwards left the country and seek to return. 21, 99.

CHINESE—Continued.

5. Merchants already here when the statute took effect may leave the country and return as if the act of November 3, 1893, had not been passed. 21.
6. Since May 6, 1882, neither State nor Federal courts had jurisdiction to admit Chinese to citizenship. 37,581.
7. The convention of March 17, 1894, between the United States and China, repeals only the act of October 1, 1888. 68.
8. The Secretary of the Treasury has power to require the production of a certificate in such form as he may prescribe, as evidence of the right of certain Chinese subjects to enter the United States. *Ib.*
9. The Secretary of the Treasury has authority to issue regulations requiring Chinese laborers residing in the United States, and who may depart therefrom for temporary sojourn abroad, to return to this country only at the ports from which they depart. *Ib.*
10. A certificate of naturalization issued by the circuit court at Montreal, Canada, and a passport issued by the governor-general of Canada can not be accepted in lieu of the certificate required by the act of July 6, 1884, in order to entitle such person claiming the right as a merchant to enter and travel in the United States. 123.
11. Chinese subjects resident of the British Colony of Hongkong desiring admittance to the United States under the provisions of the treaty of 1894 with China, must produce the necessary certificate, signed by the register-general of that colony. 347.
12. In the convention with China of 1894, the use of the words "port" and "land" do not limit the right to return to such Chinese as travel by sea. 357.
13. It is necessary for Chinese laborers to leave this country at a port which is within the jurisdiction of a Chinese consul, and should return to it at a port of entry where there is a collector; but as they have the right to go and return by land, these places need not be seaports. *Ib.*
14. Under Article II of that convention, the officer to whom the evidence of sickness or disability are to be reported, in order to enable Chinese laborers to return to the United States, is the Chinese consul at the place he left the United States. 357.
15. The policy of the Government being against the admission of Chinese laborers, treaty provisions making exceptions should not be extended by construction to cases not falling within the plain scope of the language used. 424.
16. The intent of Article II of the treaty with China was that each Chinaman should, before leaving the United States, receive from the collector a certificate of his right to return, in order to entitle him to do so. *Ib.*
17. The Treasury Department can not direct the admission of Chinese laborers who fail to obtain before their departure from this country the certificate required by the treaty with China, although they complied with all the requirements affecting Chinese laborers who leave the United States, except the procuring of certificates of their right to return. *Ib.*

CHINESE—Continued.

18. The departing Chinese laborers comply with the conditions necessary to demand a certificate, if they file the required papers with the collector of customs of the district from which they depart. *Ib.*
19. Certificates issued to residents of China by a Chinese consular officer and presented as evidence of the right of such persons to enter this country, conformably to section 6 of the act of July 5, 1884, are not entitled to be treated as made by the Chinese Government within the meaning of said act. 481.
20. The Secretary of the Treasury has no authority to limit the number of Chinese to be admitted to the United States as participants in the Tennessee Exposition. 517.
21. In case of an extension of one year allowed under certain conditions to Chinese laborers to return to the United States by the treaty with China, the date of the original certificate and the day of the return must control. 575.
22. In case of such extension neither the collector nor the Secretary of the Treasury has discretion to inquire into causes of further delay or grant additional extensions. *Ib.*
23. Certain Chinese persons of alleged American birth who entered the United States were deported to Canada, but subsequently returned to the United States: *Held*, The collector of customs has the right to enforce his exclusion by again returning them to Canada. 614.
24. A Chinese laborer leaving the United States is furnished with the necessary certificate entitling him to return within one year, but before the expiration of such period he avails himself of the privilege of an extension of one year allowed by the treaty of 1894, on the ground of sickness or other cause of disability beyond his control. He started to return in sufficient time to reach the United States by the ordinary course of travel, but was delayed in quarantine by the Canadian authorities, so that he in fact did not reach the United States until three days after the expiration of his second year: *Held*, That the return to the United States must be within the additional year which the treaty has made the sole provision for delay. 575.
25. The certificate of a United States Commissioner states that a Chinaman charged with unlawfully coming within the United States, after a full hearing, was adjudged to have the lawful right to remain in the United States, and was accordingly discharged, it appearing that he is a citizen of the United States: *Held*, That certificates of this character should not be accepted as sufficient evidence of the right of the holders to enter this country. 581.
26. Whether or not children born in this country of subjects of the Chinese Empire are to be recognized as citizens of the United States: *Quære. Ib.*

CHINESE MERCHANTS.

See CHINESE, 1, 4, 5, 10.

CIRCULATING NOTES.

See TAXATION, 3-6.

CITIZENSHIP.

Since May 6, 1882, neither State nor Federal courts have jurisdiction to admit Chinese to citizenship. 37, 581.

See CHINESE, 26; VESSELS, 4.

CIVIL SERVICE.

1. The question of whether or not M was a resident of Alabama at the time of his appointment under the civil-service rules considered: *Held*, That he was not a bona fide resident of such State on the date named. 33.
2. The Attorney-General is not at liberty to comply with a request for a further consideration and opinion upon the residence of M, a civil-service employee, as it would involve consideration and decision upon conflicting evidence. 58.
3. The phrase "no person appointed to a place" as used in the civil-service rules substituted by the President November 2, 1894, affects persons holding the positions at the time as well as those thereafter appointed. 91.
4. Certain removals of superintendents and clerks in the Baltimore post-office and the appointment of their successors held to be legal. 140.
5. The act of March 2, 1895, does not make the offices of all clerks in the offices of the Comptroller and Auditor of the Treasury the subject of competitive examination. 187.
6. The Secretary of the Treasury is authorized to make temporary appointments, without certification from the Civil Service Commission, of draftsmen and skilled service, under the act of March 2, 1895. 261.
7. An irregularity in the certification of the name of an eligible for appointment under the civil service is cured by the probational and absolute appointment of such a person. 289.
8. The certificate of eligibles delivered to the appointing officer by the subordinates of the Civil Service Commission is a complete authority to such officer to make any selection he may desire therefrom, and is a complete protection to the appointee. 335.
9. Section 4415 Revised Statutes, so far as it prescribes the method by which vacancies on the board of inspectors of hulls and steam vessels shall be filled, is repealed by the civil-service act. 393.
10. The board designated by this section to fill such vacancies can not act as a board of examiners under the civil-service act, unless its members are duly selected and appointed as such. *Ib.*
11. Rule III of the civil service includes in the departmental service all employees of whatever designation, however, or for whatever purpose employed, whether compensated by a fixed salary or otherwise, who are serving in or on detail from the several Executive Departments, commissions, and offices in the District of Columbia. 407.

CIVIL SERVICE -Continued.

12. The confidential agents employed in the free-delivery division of the Post-Office Department, and designated as secret agents, were not classified under Rule III, by the civil-service rules promulgated May 6, 1896. *Ib.*
13. This rule covers only those who are to be regarded as appointed for service in the departments at the seat of Government, whether for the time being actually employed there or detailed for service elsewhere, as distinguished from those appointed for service in the States or Territories. *Ib.*
14. Paymasters' clerks assigned to sea duty not being classified by the Executive Order of May 6, 1896, while those performing similar services in offices on shore were, there is no authority for transferring one of the former to a similar position in the Navy Department. 503.
15. The Executive Order of May, 1896, including within the classified service a person not under the civil service at the time of his appointment, bestowed upon such appointee all the rights and benefits of persons of like class or grade under the civil service, making him eligible for transfer, and retained him in the service absolutely and not subject to the period of probation. 534.
16. An employee of the Government who receives money to pay certain secret postal agents and, at the direction of one of said agents, deducts therefrom a portion thereof and pays it to the representative of a political campaign fund, is not guilty of either receiving or being concerned in receiving a contribution for political purposes within the meaning of the act of January 16, 1883. 298.
17. The intention of the above act was not to forbid voluntary contributions for political purposes by persons in the employ of the Government, but to protect them from solicitation and coercion with respect to such contributions. *Ib.*

CLAIMS.

1. The power to compromise claims in favor of the United States, which includes judgments on recognizances, is vested by law in the Secretary of the Treasury with respect to all claims save those arising under the postal laws. 494.
2. The question of the legality of payment of a claim for pay presented to the Secretary of the Treasury is one exclusively for the Comptroller, whose decision thereon is by the statute made final as to all executive officers. 530.
3. The claim of Samuel C. Reid, jr., considered and directions given for stating account with owners, etc., of the U. S. brig of war *General Armstrong* under the acts of May 1, 1882, and March 2, 1895: *Held*, That the Secretary of State has no authority to apply any part of the unexpended balance of the fund in reimbursing Samuel C. Reid, jr., or anyone else for the expenses and charges incurred in securing the appropriation. 154.

CLAIMS—Continued.

4. Upon reconsideration it is held that the unexpended balance of the appropriation made to satisfy the claims growing out of the destruction of the brig *General Armstrong* should be used to reimburse S. C. Reid, jr., to the extent that the vouchers on file in the State Department show that he has made expenditures or disbursements on this account. 523.

See ASSIGNMENTS.

CLERKS.

See GOVERNMENT EMPLOYEES.

CLOQUIT RIVER.

See NAVIGABLE WATERS, 2, 3.

CLOUD UPON THE TITLE.

A contract of option for the sale of certain lands to the officers of the Shiloh Battlefield Association, which purports to waive homestead and dower rights, although the wives of the vendors are not parties to the agreement, also purporting to have been admitted of record, when in fact it was never acknowledged or attested, etc., does not constitute a cloud upon the title. 302.

COASTING TRADE.

See VESSELS, 9.

COLLECTORS OF CUSTOMS.

1. Collectors of customs are subordinates of the Secretary of the Treasury, and section 15 of the act of June 10, 1890, providing that the collector or Secretary of the Treasury, if dissatisfied, may apply for a review of the decisions of the Board of General Appraisers, does not mean that the collector may appeal against the decision or wishes of the Secretary. 203.
2. They have no authority to interfere or direct the United States storekeeper to interfere in a controversy between the importers and the warehousemen with reference to the delivery of goods. 232.

COLLISIONS AT SEA.

See NAVIGATION RULES.

COLORADO.

See PUBLIC LANDS, 3-6.

COLUMBIA INSTITUTION FOR THE DEAF AND DUMB.

1. Advertisements for proposals in accordance with the provisions of section 3709, Revised Statutes, are not required for supplies or services for the Columbia Institution for the Deaf and Dumb. 349.
2. The Columbia Institution for the Deaf and Dumb is not a bureau, office, or other subdivision of the Department of the Interior, although Government contributions toward its support is business within the jurisdiction of that Department. *Ib.*

COMMON CARRIERS.

It is within the power of the Secretary of the Treasury to require of common carriers transporting merchandise in bond, under the immediate transportation act, to file a bond agreeing to accept and transport within a definite fixed period of time all merchandise offered under the act. 369.

COMPROMISE.

1. The Secretary of the Treasury is not authorized by section 3469, Revised Statutes, to remit or release any portion of a judgment indebtedness on consideration of hardship to certain individuals. The authority to compromise relates to claims of doubtful recovery or enforcement. 50.
2. The Secretary of the Treasury has no authority to remit or release judgments in favor of the Government from which there is no appeal and which are clearly recoverable. 264.
3. The distinction between the compromising of a doubtful case and the remission of a penalty, forfeiture, or disability is that the former is strictly a fiscal one, while the latter is in the nature of a pardoning power. *Ib.*
4. The power to compromise claims in favor of the United States, which includes judgments on recognizances, is vested by law in the Secretary of the Treasury with respect to all claims save those arising under the postal laws. 494.
5. An assessment made by the Treasury Department of 10 per cent, under the provisions of section 20 of the act of February 8, 1875, upon the circulating notes of Canadian banks which had come into the United States and been received and paid by banks in Calais, Me., is one which may be compromised. 557.

COMPTROLLER OF THE TREASURY.

1. The question whether or not the Secretary of the Treasury is authorized by the appropriation act for the fiscal year 1896 to purchase newspapers and other articles for use outside of Washington, in view of sections 192 and 3683, Revised Statutes, belongs to a class of questions which should be submitted to the Comptroller of the Treasury, except in matters of great importance, as under the act of July 31, 1894, his opinion is a complete protection. 178.
2. The act of July 31, 1894, makes it obligatory upon the Comptroller of the Treasury to make a decision upon any question involving a payment to be made by or under the head of any department, and it contemplates the construction by him of statutes. 181.
3. The Comptroller is an agent of the Government in the broad sense of the term, but is more properly called an officer, and was not intended to be included within the meaning of the word "agent" in section 3469, Revised Statutes. 361.
4. The question as to the right to refund certain duties claimed to have been collected through mistake of law should be asked of the Comptroller of the Treasury. 188.

COMPTROLLER OF THE TREASURY—Continued.

5. An opinion which could have been asked of the Comptroller of the Treasury is notwithstanding given by the Attorney-General, it appearing that the question is one of importance, and the Comptroller joins in requesting it. 224, 181, 402.
6. The Attorney-General will not pass upon the question to what appropriation a certain expenditure should be charged, as it is one which should more properly be submitted to the Comptroller of the Treasury. 405, 221.
7. On questions of disbursement of money or payment of claims, which are by law relegated to the Comptroller, the Attorney-General should not render an opinion. 530.
8. The question of the legality of payment of a claim for pay presented to the Secretary of the Treasury is one exclusively for the Comptroller, whose decision thereon is by the statute made final as to all executive officers. 530.

See CIVIL SERVICE, 5.

CONDEMNATION.

See EMINENT DOMAIN.

CONGRESSMEN.

1. During the term of R. as United States Senator, Congress increased the salary of the minister to Mexico. On February 23, 1895, the President nominated R. to such office, and he was confirmed the same day, but did not take the oath of office until March 4, 1895, when his term expired. His commission was delivered to him the following day: *Held*, That the nomination by the President and confirmation by the Senate constituted the appointment within the inhibition of the Constitution relative to the appointment of members of Congress to an office the emoluments whereof have been increased during the term for which he was elected. 211.
2. The acceptance of any office under the United States by a member of either House of Congress operates as a vacation of his seat, as he is disabled by the Constitution from holding any civil office under authority of the United States while a member of either House. *Ib*.
3. Members of Congress whose seats are contested, until a decision is made unseating them, are considered in all respects endowed with the same rights, powers, and privileges as other members. 342.

See NAVAL ACADEMY, 1-4.

CONSPIRACY.

Interference with the carriage of the mail on railroads in the usual and ordinary way is a criminal offense, and the combination of offenders may be prosecuted under section 5440, Revised Statutes. 8.

CONSULAR OFFICERS.

1. Consular officers of the United States can not extend expired inspection certificates granted to American steamers, nor is there any authority of law for sending local inspectors out of the country to make inspection. 52.
2. The United States consul in intervening by mutual consent of the parties in a controversy between the officers and crew of the unregistered yacht *Barraconta*, acted merely as an arbitrator and not as consul. 201.

See CUSTOMS LAWS AND REGULATIONS, 26-29.

CONTESTED ELECTIONS.

See CONGRESSMEN, 3.

CONTRACTS.

1. It is not competent for the Secretary of the Navy under the contract for the construction of the battle ship *Indiana* to pay to the contractors certain reserved payments prior to her preliminary or conditional acceptance, but a supplemental contract may be entered into, modifying the terms and provisions of the existing contracts. 12.
2. A penalty imposed under a contract for delay in completing a work which has been finished according to the contract without damage to the Government, may be remitted by the Secretary of War and the sum withheld paid to the contractor. 27.
3. A contract for the improvement of the Hudson River may be legally modified so as to provide for the acquirement by the United States through process of condemnation of the necessary lands for use as dumping grounds to be maintained by the contractors. 78.
4. The Secretary of the Treasury has no power, by virtue of his general authority, to change contracts entered into by the United States with responsible parties secured by responsible sureties, in the interest of private parties thereto, without considerations inuring to the United States. 115.
5. The provision in a contract providing for the forfeiture of \$20 per day for each day's delay in completing certain work at West Point Military Academy, is to be regarded as a penalty, and in case of delay it is lawful to assess against the contractor the actual damages sustained instead of the penalty. 139.
6. Modifications of contracts to meet contingencies may be made upon consent of the contracting parties, without rescinding and abrogating the entire contract. 207.
7. The modification of a contract which does not prejudice the interests of the Government or violate any statutory provision, is not such a new contract as must be preceded by an advertisement for proposals from bidders. *Ib.*
8. Executive officers are expressly prohibited from making contracts to extend beyond one year and for which no appropriation by Congress has been made. 207, 304.

CONTRACTS—Continued.

9. N notified the Secretary of War that it elects to carry on the work of dredging in the Mobile Harbor under its contract if the appropriation is exhausted without waiting for the appropriation by Congress to pay for it, and asks the Secretary of War to supervise the same. *Held*, That he is without authority to continue the employment of the contractors, and that the work which they propose to do does not come within their contract, and that he can not supervise it. 244.
10. A contract not for the completion of any specific work, as the erection of a building, the construction of a road, or rendering a channel adequate for the passage of vessels of a certain draft, is at an end after the appropriation becomes exhausted. Work done thereafter would not come within such contract. If further appropriations are made there must be a new contract for their expenditure. *Ib*.
11. The Secretary of War is not required by the act of March 3, 1896, providing that contracts *may* be entered into by him for the completion of improvements named, to make such contracts, but he may decline to do so in all cases where he is convinced the public interest would not be subserved by making them. 420.
12. Contracts for the purchase of seals by the United States used to secure packages while being transported in bond, must be awarded upon advertisement. 304.
13. The period at which persons reach their majority and become *suī juris* with respect to the ordinary affairs of life can not abridge this power of the General Government. 327.
14. Under section 5 of the river and harbor act of June 3, 1896, which limits the amount that the Secretary of War can obligate the Government for in any fiscal year to \$400,000, the contractor may perform in one year the work which the contract allows him three years, and although he may earn a larger sum than this amount, he may not receive full payment therefor under three years. 379.
15. Where the total amount authorized to be expended is less than \$400,000, contractors may be allowed to earn the amounts authorized to be expended in advance of the appropriation by Congress for such work. *Ib*.
16. The contract with the Pneumatic Gun Carriage and Power Company for the construction of a disappearing gun carriage under the act of August 1, 1894, makes no provision for the payment of a premium, and does not bind the Government beyond the amount appropriated. 457.
17. The letting of this contract for the full amount appropriated exhausted the power of the Secretary of the Navy under the act, and there is no authority for making a supplemental contract binding the Government to further expenditures in the way of premiums. 495.

CONTRACTS—Continued.

18. What one party to a contract may have personally understood a provision to mean at the time the contract was made can not avail. What both parties understood controls, and that is to be ascertained from the language of the contract itself. 585.
19. Under the contract for the improvement of Galveston Harbor the railway to be built upon trestlework following the line of the jetty must be at the expense of the Government, whether it is the case of original construction or extension. 607.

See ADVERTISEMENTS; APPROPRIATIONS; BIDS; CLOUD UPON TITLE; ELLIS ISLAND, ETC., 1, 5; PATENTS, 4; RIVERS AND HARBORS.

CONTRIBUTIONS FOR POLITICAL PURPOSES.

See CIVIL SERVICE, 16, 17.

COPYRIGHTS.

1. Section 3 of the act of March 3, 1891, designed to protect domestic authors against foreign infringements of their copyrights, applies as well to books copyrighted before as those copyrighted after the passage of the act. 159.
2. The exceptions in the case of persons purchasing for use and not for sale, who import, subject to the duty thereon, not more than two copies of such book at any one time, is not limited in its application to the "authorized editions" of such book. *Id.*
3. The importation of foreign-made chromos which have not been copyrighted, but which are copies of a foreign copyrighted painting, is not prohibited by the act of March 3, 1891, amending section 4956, Revised Statutes. 416.
4. A foreigner simulating a trade-mark of a domestic manufacturer can not obtain the right to send fraudulently marked goods into the country merely by recording his fraudulent mark under section 6 of the act of August 27, 1894, before the domestic manufacturer has taken the steps necessary to protect himself. 260.

COUNSEL.

See DEPARTMENT OF JUSTICE, 1.

COUNTERFEITING.

1. The Attorney-General will not give an official opinion upon the question whether certain plates and cuts used for making sketches and pictures of foreign postage stamps come within the terms of the act of May 16, 1884, and the act of February 10, 1891 (except section 4), prohibiting counterfeiting, because they relate only to criminal proceedings. 133.
2. The counterfeiting of an uncanceled foreign postage stamp comes within the meaning of the phrase "obligation or other securities * * * of any foreign government," in section 4 of the act of February 10, 1891. 136.

COURT-MARTIAL.

See PENITENTIARIES, 1.

COURT OF CLAIMS.

1. The expression, "any judge of any court of the United States" may be retired under section 714, Revised Statutes, was intended to have the widest application, and applies to the chief justice as well as the judges of the Court of Claims. 449.
2. The expression, "after having held his commission as such at least ten years," in the foregoing section, does not mean that the commission under which the judge serves at the time of his retirement must have been in force at least ten years. It was being in commission and not holding a particular commission that Congress meant to make a condition. *Ib.*

CUBAN INSURRECTION.

1. The Cuban insurrection can not be brought within the rules of international law with respect to belligerence and neutral rights and duties. 267.
2. The sale and shipment or carriage of arms and munitions of war to Cuba does not become a violation of international law merely because they are destined to a port which is recognized by the Spanish Government as open to commerce, nor because they are to be or are landed by stealth. *Ib.*
3. The mere sale or shipment of arms and munitions of war by persons in the United States to persons in Cuba is not a violation of international law, however strong a supposition there may be that they are to be used in an insurrection against the Spanish Government. Individuals in the United States have the right to sell such articles and ship them to whomever may choose to buy. *Ib.*
4. Neither our Government nor our citizens have means of knowledge and therefore can not be bound to take notice who are and who are not loyal subjects of Spain, so long as their actions are confined to her own territory. *Ib.*
5. If persons supplying or carrying arms and munitions from a place in the United States are in any wise parties to a design that force shall be employed against the Spanish authorities, or that either in the United States or elsewhere, before final delivery of such arms and munitions, men with hostile purposes toward the Spanish Government shall also be taken on board and transported in furtherance of such purposes, the enterprise is not commercial but military, and is in violation of international law and of our own statutes. *Ib.*

See INTERNATIONAL LAW, 1-8.

CUSTOM-HOUSE BROKER.

1. The term "custom-house broker," as used in the tariff act of 1894, section 23, includes persons who deal in drawback matters exclusively, as well as those who combine all branches of custom-house work. 255.
2. When the license of such a broker has been revoked, he can not thereafter deal directly with the customs officials, except when acting for himself as principal. *Ib.*

CUSTOM-HOUSE BROKER—Continued.

3. The authority to collect drawback may be delegated by a manufacturer to a general selling agent or to some attorney at law, but such a person must conduct his business through a licensed broker unless he obtains himself a license. *Ib.*

CUSTOMS LAWS AND REGULATIONS.

IN GENERAL—

1. Goods smuggled into the United States may be seized and sold by a collector of customs although protected by patents. 72.
2. "Sea stores," in tariff legislation, are the stores contained in incoming vessels which are necessary for use for the purpose of the voyage; articles brought into port aboard ship to be consumed aboard or carried off again on the outward voyage, or if put ashore at all, landed only for the convenience of the ship itself. 92.
3. The word "merchandise" is used in different senses in different parts of the customs legislation. In sections 2766 and 3111, Revised Statutes, it covers any tangible personal property. In sections 2795 and 3113 it means property imported into the country, whether for sale or not. In the act of March 3, 1875, it has a narrower meaning, but still includes personal property not imported for the use or enjoyment of the importer himself. *Ib.*
4. The export tax imposed by a foreign government is not to be considered as one of the "costs, charges, and expenses" referred to in section 19 of the customs administrative act of June 10, 1890. 108.
5. The decisions of the Secretary of the Treasury on all questions as to the construction or meaning of any part of the revenue laws are made conclusive upon all customs officers by section 2652, Revised Statutes. 203.
6. Collectors of customs are subordinates of the Secretary of the Treasury, and section 15 of the act of June 10, 1890, providing that the collector or Secretary of the Treasury, if dissatisfied, may apply for a review of the decisions of the Board of General Appraisers, does not mean that the collector may appeal against the decision or wishes of the Secretary. *Ib.*
7. The importation of foreign-made chromos, which have not been copyrighted, but which are copies of a foreign copyrighted painting, is not prohibited by the act of March 3, 1891, amending section 4956, Revised Statutes. 416.

ABANDONMENT—

8. Goods not damaged may be abandoned to the United States under section 23 of the act of June 10, 1890, and the importer thereof relieved from the payment of duty. 326.
9. It is not the intent of Congress that the United States should in any case exact as duties an amount greater than the value of the property imported. *Ib.*

CUSTOMS LAWS AND REGULATIONS—Continued.

ABANDONMENT—Continued.

10. In an application for an abandonment under section 23 of the customs administrative act of June 10, 1890, the Board of General Appraisers had jurisdiction to review the collector's decision, which review is final for all purposes, since the importers did not appeal. 402.

BOARD OF GENERAL APPRAISERS—

11. The General Appraisers appointed under the provisions of the act of June 10, 1890, are officers of the Treasury Department. 85.
12. In case of inefficiency, neglect of duty, or malfeasance in office, it is the duty of the Secretary of the Treasury to investigate the matter for the advice of the President. *Ib.*
13. A protest filed by an importer under the customs administrative act of 1890 was overruled by the Board of General Appraisers on September 26, 1892. The decision was in part made inadvertently, some of the evidence being overlooked, which was first called to their attention on July 6, 1894, with the request that the decision be reviewed. *Held*, that it was the importer's duty to watch for the decision of the board, and that after the lapse of time stated it was without further jurisdiction in the premises. 144.
14. The Board of General Appraisers has jurisdiction under section 14 of the act of June 10, 1890, to decide whether cartage charges as made by a collector of customs are proper. 262.
See 10, 79.

BONDED WAREHOUSES—

15. Goods imported and warehoused for nearly three years, then withdrawn and exported to Canada, and finally reshipped to the United States by a different merchant, the transaction not appearing to be merely colorable for the purpose of evading the tariff laws, may be entered for warehousing as an original importation within section 2971, Revised Statutes. 23.
16. The provisions of the South Carolina dispensary law of 1893 are ineffective and inoperative as against distilled liquors held in a United States bonded warehouse under the control of a collector of internal revenue. 73.
17. Distilled liquors in a bonded warehouse are exempt from the operations of the process of a State court. *Ib.*
18. Goods imported and entered for warehouse prior to the act of August 28, 1894, and not withdrawn for consumption within three years from the date of the original importation, are unaffected by the new rates of duties. 116.
19. Goods deposited before that act in store as unclaimed merchandise under section 2965, Revised Statutes, may be withdrawn for consumption upon payment of the new rates of duties at any time within three years from the date of their original importation, so long as they remain unsold. If sold, however, the duty is to be deducted from the proceeds of sale, as are those of 1890. *Ib.*

CUSTOMS LAWS AND REGULATIONS—Continued.

BONDED WAREHOUSES—Continued.

20. Whether goods exported for the mere purpose of extending the three years' warehousing period provided by the statutes, and immediately reimported, can be regarded on the second arrival as an original importation under the customs laws. *Quare.* 129.
21. The collector of customs has no authority to interfere or direct the United States storekeeper to interfere in a controversy between the importers and the warehousemen with reference to the delivery of goods. 232.
22. The Government has no further concern with imported goods which have been deposited in a private bonded warehouse, the duty having been paid and a withdrawal permit issued, and the right to deliver or withhold rests with the warehouseman alone. *Ib.*
23. Under the act of August 27, 1894, dutiable goods purchased by the United States from an importer while in bond remain dutiable, and the duty must be paid before delivery. 243.
24. The by-products, such as rice meal and broken rice resulting from the cleansing of imported rice in importers' bonded warehouses, intended for exportation, may be withdrawn for consumption instead of exporting. 474.
25. The act of March 2, 1874, relative to bonded warehouses for the storage of imported rice is still in force. *Ib.*
See 71, 89.

DECLARATIONS TO INVOICES—

26. The person making the declaration to an invoice of goods intended for shipment under the customs-administrative act of June 10, 1890, is not required to be actually present before a consular officer of the United States in order to authorize such officer to certify such invoice. 571.
27. All that is necessary is that he shall be satisfied that the person making the oath thereto is the person he represents himself to be; that he is a credible person, and that the statements made under such oath are true. *Ib.*
28. Where the consular officer has doubts as to the identity of the person making the declaration, or as to his credibility or the truthfulness of the statements set forth in the declaration, he has the right to require the declarant to come personally before him. *Ib.*
29. The question as to where and in what manner oaths to the declarations indorsed on invoices shall be taken, is more a matter of regulation or instruction for the government of the consular officer than of construction of a statute. *Ib.*

DISCRIMINATING DUTIES—

30. Paragraph 608 of the tariff act of August 27, 1894, imposing a discriminating duty on salt imported from a country which imposes a duty on salt exported from the United States, does not violate the "most favored nation clause" in the treaty of May 1, 1828, with Prussia. 80.

CUSTOMS LAWS AND REGULATIONS—Continued.

DISCRIMINATING DUTIES—Continued.

31. Whether or not such discriminating duty applies to a country which imposes a duty on salt exported from the United States, but lays a countervailing excise tax on domestic salt. *Quere, Ib.*
32. As to whether a discriminating duty should be imposed under the act of 1894 upon salt imported from Germany, which country imposes a duty in the nature of an internal excise tax on salt exported from the United States. *Quere. 377.*
33. Diamonds imported into the United States from Canada, not in the usual course of strictly retail trade, which were the productions of a foreign country not contiguous to the United States, are subject to the discriminating duty of 10 per cent under section 22 of the tariff act of July 24, 1897. 591.
34. In determining the liability to this discriminating duty, it is not necessary to ascertain the mode of conveyance used in the transportation into the United States from Canada. *Ib.*
35. Certain goods came from Japan via Vancouver, British Columbia, and thence per railroad through Canada to Chicago, in cars sealed at Vancouver by a United States consular officer: *Held*, not to be subject to a discriminating duty, as section 4228, Revised Statutes, is not repealed by section 22 of the Dingley tariff act. 597.
36. The purpose of this section was to secure to United States vessels the transportation of goods by sea by discriminating against transportation in other vessels to the United States, and also to prevent evasion to a contiguous country. *Ib.*
37. To hold that there should be a discrimination by different duties upon importations, direct or indirect, under section 22 of the above act would be to put a new purpose in the law and destroy its unity. This is not compelled by its language or any mischief intended to be remedied. *Ib.*
38. Section 22 of this act and section 4228, Revised Statutes, as amended, are not coextensive in scope, therefore are complements of each other. *Ib.*
39. Section 4228, Revised Statutes, is in effect made a proviso to section 22 of the Dingley tariff act by the act of July 24, 1897, and as such, is not repugnant to section 22. *Ib.*
40. The operation of section 22 commenced with its passage and continues until it is suspended according to section 4228, Revised Statutes, and again takes effect if the reciprocal exemptions of foreign nations be withdrawn. *Ib.*

DRAWBACKS—

41. The question of drawbacks upon exhibits of foreign governments at the World's Fair is governed by the act of April 25, 1890, and not by section 3025, Revised Statutes. 36.

CUSTOMS LAWS AND REGULATIONS—Continued.

DRAWBACKS—Continued.

42. A drawback is allowable on oil cake made from imported linseed under the tariff act of August 28, 1894. 109.
43. The proviso to paragraph 25 of the McKinley tariff act allows a drawback only in cases where the article manufactured or produced can be so separated into its component materials that the relative proportions of each material may be ascertained without reference to past books of account. 110.
44. This section is intended to apply only to cases where the article is made up of two or more different materials. *Ib.*
45. A drawback is claimed under section 25 of the McKinley tariff act on certain lead ore used in smelting operations, the lead in the ore which is used being about 90 per cent of foreign origin and 10 per cent domestic: *Held*, that no portion of the lead entered for drawback could be regarded as incidental to any other portion thereof or to the whole, nor is the proportion of the domestic lead in the total product small enough to be disregarded. 110.
46. Drawback of duties can not be allowed by reason of the existence of product of foreign ore in the lead of which the manufactured article is composed. 229.
47. Camel's hair noils, resulting from the separation of imported camel's hair into hair and noils, were not entitled to drawback under section 25 of the tariff act of October 1, 1890, as a manufactured article. 159.
48. Imported articles of domestic origin are to be regarded as "imported materials," within the meaning of section 22 of the act of August 28, 1894, and are entitled to a drawback where their prior importation was not merely colorable. 501.
49. The exportation of alcohol with the intention of its reimportation for the purpose of taking advantage of the drawback privileges is to be regarded as colorable only, and the alcohol is to be forfeited, the person engaged in the transaction punished, and no drawback is recoverable. *Ib.*
50. Where the exportation of alcohol is genuine and with the intent to dispose of it abroad, so that upon its arrival there it is to be regarded as absorbed in the general mass of foreign commodities, the subsequent importation is proper. *Ib.*
51. The authority to collect drawback may be delegated by a manufacturer to a general selling agent or to some attorney at law, but such a person must conduct his business through a licensed broker unless he obtains himself a license. 255.
52. "Drawback moneys" are duties—repayment to the importer or the person to whom he has transferred his rights, of a part of the duties which have been paid by him upon receiving his goods. *Ib.*

CUSTOMS LAWS AND REGULATIONS—Continued.

DUTIES—

53. The Secretary of the Treasury is authorized to prescribe reasonable rules, and such as are necessary to secure the collection of the duties on imports and to protect the United States from irregular or fraudulent proceedings. 571.
54. A vessel containing a cargo of sugar for the United States was wrecked in the journey; she was subsequently returned with the goods to the port of departure, repaired, and the goods reloaded on the same vessel: *Held*, that the goods should not be appraised under section 2928, Revised Statutes, as merchandise taken from a wreck. 121.
55. Under the act of August 28, 1894, dutiable goods purchased by the United States from an importer while in bond remain dutiable and the duty must be paid before delivery. 243.
56. The importation of certain bird of paradise feathers, being composed of natural feathers which are neither dressed, colored, nor manufactured, is not included within paragraph 328 of the tariff act of August 28, 1894. 541.
57. Books imported for the purpose of sale are dutiable under the act of August 28, 1894. 301.
58. The phrase "manufactures of wool" in paragraph 297 of the act of 1894 does not include articles of which wool is a component material but of which it is not the material of chief value. 66.
59. The phrase "manufactures of wool" has been given a restrictive meaning in prior tariff acts. There is a presumption, in the absence of anything to the contrary, that Congress intended it still to have the same significance. *Ib.*
60. The headings of the schedules in the tariff act have little significance, they being intended only for general suggestions as to the character of the articles within the schedules. *Ib.*
61. All doubts arising under the act are presumptively to be resolved in favor of the lower rate of duty, save where the act mentions or describes the same article in two different places, when the higher rate governs. *Ib.*
62. Persons crossing into Canada for no other purpose than to purchase clothing there, and immediately returning, are not entitled to introduce the same free of duty as "personal effects" under the tariff act of 1890. 3.
63. The duty on the by-products, such as broken rice and rice meal, withdrawn for consumption from importers' bonded warehouses should be assessed upon the proportion of unclean rice represented by such by-products. 474.
64. The by-products, such as rice meal and broken rice, resulting from the cleansing of imported rice in importers' bonded warehouses intended for exportation may be withdrawn for consumption instead of exportation. *Ib.*
65. The word "wool," as used in paragraph 297 of the tariff act of 1894, refers to hair of the sheep only, and the new duties upon articles made of the hair of other animals went immediately into effect upon the passage of the act. 66.

CUSTOMS LAWS AND REGULATIONS—Continued.

DUTIES—Continued.

66. "Wool," within dictionary definitions, includes the hair of the alpaca and of the angora goat, but never is used to include all goat's hair, nor yet camel's hair, cow hair or horse hair. Throughout schedule K of the above act it is used so as to include even hair of the kinds first mentioned. *Ib.*

PENAL DUTIES—

67. A consignee representing two different principals made an entry covering two invoices of goods imported by the same vessel upon each of which there was a penal duty. The invoice is to be treated as the unit and not the entry. 283.
68. The statutes forbid the Secretary of the Treasury from making a customs regulation permitting collectors of customs to receive as special deposits penal duties, to be returned to the importers in case of a remission of the duties. 345.
69. All moneys paid to collectors of customs for unascertained duties, must be placed to the credit of the Treasurer of the United States. *Ib.*
70. When goods are entered or withdrawn for consumption, all duties then charged against them, including penal duties, must be paid before they are released from Government custody. 418.
- See 80-89.

REFUNDS—

71. Upon an application to withdraw free of duty under the merchant shipping act certain warehoused coal imported under the tariff act of 1890, the shipper being refused, paid without protest in order to get possession thereof, certain liquidated duties that had been erroneously assessed: *Held*, that the Secretary of the Treasury had the authority to refund the amount so collected. 92.
72. The act of March 3, 1875, was intended only to apply to cases where the duties are improperly assessed and therefore improperly collected. *Ib.*
73. The power to refund duties collected by mistake, in the absence of a proper protest, is limited to the following: (1) when the duties provisionally paid are reduced upon the final liquidation; (2) for mere clerical error; (3) for mutual mistake of fact. 224, 251.
74. Prior to the customs administrative act, duties collected by mistake of law, could not be returned after one year from the time of entry in the absence of a protest by the importer under section 2931, Revised Statutes. 251.
75. There is no statutory authority for the Secretary of the Treasury to refund penal duties which have been paid into the treasury on the ground that they were incurred without willful negligence or an intention of fraud on the part of the importer. 320.
76. The Secretary of the Treasury is authorized to make a refund of duties where there was an error due to a mutual mistake of fact. 454.

CUSTOMS LAWS AND REGULATIONS—Continued.

REFUNDS—Continued.

77. A mistake on the part of the Secretary of the Treasury in estimating the equivalent of the Spanish pound or libra, in the absence of due protest by the importers, is not sufficient to warrant a refund of the excess of duties paid under such erroneous estimate. *Ib.*

RELIQUIDATION OF DUTIES—

78. Section 14 of the act of June 10, 1890, did not in any way limit the power of the collector of customs to reliquidate duties in the interest of the Government within one year after entry. 334.
79. The duty on an importation of mohair goods after August 28, 1894, being erroneously assessed, an appeal was taken to the Board of General Appraisers, and upon notice by the appraiser that a mistake of fact had been made, the collector requested a return of the papers for reconsideration, but the board declined to comply: *Held*, that section 1 of the act of March 3, 1875, is still in force and that the Secretary of the Treasury has the power to order a reliquidation of the assessment of duties in the interest of the importers and to direct the return of the papers to the collector. 152.

REMISSION OF PENALTIES—

80. In case of a fraudulent undervaluation by one partner of a firm, although it was his purpose to cheat his own firm, as well as the United States, the Secretary of the Treasury is without authority to remit the consequent penalty. 90.
81. Section 17 of the antimoiety act supersedes section 5292, Revised Statutes, as to all cases arising under the customs laws except those of vessels and merchandise seized or subject to seizure and of less value than \$1,000. 101.
82. Penal duties may be remitted by the Secretary of the Treasury under the provisions of section 5293, Revised Statutes, where they do not exceed \$1,000. 283.
83. And without recourse to a proceeding before a district judge. 101.
84. The limit of \$1,000 referred to in section 5293, Revised Statutes, and section 20 of the antimoiety act refer to the amount of the penalty to be remitted and not to the value of the merchandise. *Ib.*
85. The Secretary of the Treasury may return the findings to the United States commissioner in proceedings for the remission of penalties under the act of June 22, 1874, for further hearing upon the claim of newly discovered evidence. 289.
86. But he has no authority to prosecute a further inquiry into the facts after the commissioner has reported his findings under section 18 of said act. 549.
87. The Secretary of the Treasury has power to remit a fine or penalty under section 5294, Revised Statutes, as amended, but he can not remit a forfeiture. 291.
88. There is no statutory authority for the Secretary of the Treasury to refund penal duties which have been paid into the Treasury on the ground that they were incurred without willful negligence or an intention of fraud on the part of the importer. 320.

CUSTOMS LAWS AND REGULATIONS—Continued.

REMISSION OF PENALTIES—Continued.

89. Where payment of the penal duties imposed under section 7 of the act of June 10, 1890, is required as a condition precedent to the delivery of the goods, the power of the Secretary of the Treasury to remit such penalties is unavailing in many cases, but not in the case of warehoused goods, nor where the penalties are first assessed upon final liquidation after the delivery of the goods to the importer. 418.

DAMAGES.

The appropriation in the act of March 2, 1895, for raising the height of the dam at Great Falls and for damages on account of the consequent flooding of land and other injuries was intended to cover all damages that might result from raising the dam 2½ feet higher than had been contemplated under the act of July 15, 1882. 223.

See EXECUTIVE DEPARTMENTS, 1; SEAL FISHERIES, 2.

DAMS.

See RIO GRANDE RIVER, 1, 2; NAVIGABLE WATERS, 2, 3, 12, 13.

DATE.

The date is no part of the substance of a sealed instrument and not necessary to be inserted. The real date is the time of its delivery, which may always be proved. 469.

DEAF AND DUMB INSTITUTION.

See COLUMBIA INSTITUTION FOR THE DEAF AND DUMB.

DECLARATIONS TO INVOICES.

See CUSTOMS LAWS AND REGULATIONS, 26-29.

DEFINITIONS.

See WORDS AND PHRASES.

DELIVERY TO IMPORTERS.

See CUSTOMS LAWS AND REGULATIONS, 21, 22.

DEPARTMENT OF AGRICULTURE.

1. All appointments and removals of messengers and laborers in the Department of Agriculture must be made by the Secretary or Acting Secretary. 355.

See ABSENCE, 5; BIDS, 6-8; CATTLE; MEAT INSPECTION; SECRETARY OF AGRICULTURE; SEEDS.

DEPARTMENT OF JUSTICE.

1. The Secretary of the Navy is not authorized to employ special counsel in foreign countries to institute suits in behalf of the United States for the purposes of recovering damages caused to war vessels of the United States, but should refer the matter to the Department of Justice for attention. 195.
2. The Department of Justice is charged with the duty of determining when the United States shall sue, for what it shall sue, and that such suits shall be brought in appropriate cases. 195.

See ATTORNEY-GENERAL.

DEPARTMENTAL CLERKS.

See ABSENCE; APPOINTMENTS, &c., 2, 3; CIVIL SERVICE; GOVERNMENT EMPLOYEES.

DEPARTMENTAL CONSTRUCTION.

1. When an act of Congress has for a considerable period received a uniform departmental construction, which was known to Congress, and a subsequent act in *pari materia* is enacted without change of language, there is a presumption of considerable force that the new language is intended to receive the same construction as the old. 338.
2. If there be any ambiguity in a statute, the uniform departmental practice for a number of years should be regarded as having settled the law. 412, 349.
3. This is especially so where the language was not modified when incorporated in the Revised Statutes. 349.
4. Departmental practice which has not been uniform, although of long standing, forms no guide to the construction of the law. 363.
5. A uniform departmental practice, continuing for a quarter of a century, ought to be conclusive in case of an ambiguous statute. 408.
6. The weight to be given departmental practice is greatly increased when Congress, in reenacting the law, fails to indicate in any way its disapproval of the settled construction, to which it is thus regarded as giving an implied approval. *Ib.*
7. Departmental practice clearly defeating the obvious purpose of a statute which is not ambiguous, should not govern in its interpretation. *Ib.*

DEPORTATION.

See CHINESE, 3, 23.

DEPOSIT OF SAVINGS.

See NAVY, 7.

DIPLOMAS.

See WORLD'S COLUMBIAN EXPOSITION, 2, 3, 5.

DISBURSING OFFICER.

See MONEY IN DISPUTE, 1.

DISCHARGE CERTIFICATE.

See MILITIA, 1.

DISCRIMINATING DUTIES.

See CUSTOMS LAWS AND REGULATIONS, 30-40.

DISCRIMINATIONS.

See QUARANTINE, ETC., 3.

DISPENSARY LAW OF SOUTH CAROLINA.

See INTERNAL REVENUE, 1, 2.

DISTILLED LIQUORS.

See CUSTOMS LAWS AND REGULATIONS, 16, 17.

DISTRICT ATTORNEYS.

United States district attorneys are not required or authorized to make the examination into the sufficiency of the sureties on official bonds required by section 5 of the act of March 2, 1895. 154.

DISTRICT OF COLUMBIA.

1. Certain questions arising in the settlement of an award made under a joint resolution of Congress, approved July 10, 1888, to arbitrate and settle certain questions at issue between the District of Columbia and Samuel Strong considered. 87.
2. The unauthorized stretching of wires across the Iowa Reservation in the District of Columbia is governed by section 1818, Revised Statutes, and should be brought to the attention of the Secretary of the Interior. 224.
3. The laying of conduits or erection of overhead wires for electric lighting purposes in any park or reservation for the purpose of illumination is prohibited by the act of March 3, 1897. 545.
4. The board created by the act of September 27, 1890, establishing the Rock Creek Park, has no power to authorize the construction of a reservoir for the use of the District of Columbia within the limits of such park. 566.
5. It is not necessary under existing law for the Secretary of the Treasury to advertise in six newspapers, published in the District of Columbia, for proposals for the interior finish of the post-office building in the city of Washington. 595.
6. The selection of newspapers in which to publish advertisements of this character in the District of Columbia is in the discretion of the head of the Department. *Ib.*

DRAUGHTSMEN.

See CIVIL SERVICE, 6.

DRAWBACKS.

See CUSTOMS LAWS AND REGULATIONS, 41-52.

DUTIES.

See CUSTOMS LAWS AND REGULATIONS.

EIGHT-HOUR LAW.

See LABORERS AND MECHANICS.

ELLIS ISLAND IMMIGRANT STATION.

1. The express stipulation in certain contracts with reference to rentals at Ellis Island that they may be annulled by the Secretary of the Treasury for cause implies some facts or state of facts inducing or justifying an abrogation of the contract for the benefit of the United States. 115.

ELLIS ISLAND IMMIGRANT STATION—Continued.

2. The Secretary of the Treasury may grant a license, revocable at his will, to erect and maintain a building on Ellis Island, an immigrant station, for the purpose of an exhibition hall and conducting a land and labor bureau. 473.
3. He has power under section 9 of the act of March 3, 1893, to grant exclusive privileges in connection with Ellis Island Immigrant Station, after public competition, under such limitations and conditions as he may prescribe. 476.
4. He has no authority to lease any part of Ellis Island. *Ib.*
5. In a contract for ferry service between Ellis Island Immigrant Station and the Barge Office, New York, to continue for three years and thereafter from year to year until terminated by notice from either party, given sixty days before the end of the original period or any one year thereafter, and in which it was also covenanted that the contract might be annulled and terminated at any time by the Secretary of the Treasury for good and sufficient cause: *Held*, that the burning of the buildings on Ellis Island, the removal of the immigrant station from that place, and the discontinuance of the ferry service supplied a good and sufficient cause for the termination of the contract to the Secretary of the Treasury. 585.

EMINENT DOMAIN.

1. Under the river and harbor act of August 18, 1894, and the act of April 24, 1888, the Secretary of War has full authority to condemn the land necessary for the construction of a boat railway provided for in the former act. 221.
2. If a change in the location of an existing railroad is a necessity in the building of an authorized boat railway, the acquisition by the Secretary of War of the necessary land to make such a change is merely an incident to the enterprise intrusted to him. 221.
3. The United States in their sovereign capacity have power to acquire and hold real estate wherever and whenever needed for the use of the Government in the execution of any of its powers. 455.
4. Such property may be acquired by any of the means by which natural or artificial persons may acquire property, subject in certain cases to the local laws of the State. *Ib.*
5. A contract for the improvement of the Hudson River may be legally modified so as to provide for the acquirement by the United States through process of condemnation of the necessary lands for use as dumping grounds to be maintained by the contractors. 78.

ENGRAVING AND PRINTING.

See BUREAU OF ENGRAVING AND PRINTING.

ENTRY OF GOODS.

See CUSTOMS LAWS AND REGULATIONS, 67.

EVIDENCE.

The Secretary of the Treasury may return the findings to the United States commissioner in proceedings for the remission of penalties under the act of June 22, 1874, for further hearing upon the claim of newly discovered evidence. 289.

EXCLUSIVE PRIVILEGES.

See ELLIS ISLAND IMMIGRANT STATION, 3.

EXECUTIVE.

The Executive has no right to interfere or control the action of the judiciary in proceedings against persons charged with being concerned in hostile expeditions against friendly nations. 267.
See APPOINTMENTS AND REMOVALS, 1.

EXECUTIVE DEPARTMENTS.

1. An injunction will not lie against one of the departments of the Government to restrain the manufacture or use of an article alleged to be an infringement of a patented invention, nor will a claim for damages lie against the Government for such use. 96.
2. It is unlawful for an executive department to make a contract for supplies for a longer term than one year from the time the contract was made. 304.
3. The sole responsibility of every appointment in an executive department rests upon the head of that department, except where otherwise specially provided by statute. 355.
4. The power of appointment and removal in an executive department being discretionary in character, they can not be delegated. *Ib.*
5. The statutory designation of 2 o'clock p. m. for the opening of all proposals in each Department means only that such proposals shall not be opened before 2 o'clock p. m., thus securing to both the Government and the bidders the advantage of the prescribed moment prior to which no bids can be opened. 546.
See BIDS, 1-8; MONEY IN DISPUTE, 1, 2; PRINTING, ETC.

EXTRADITION.

1. In an application by Mexico to a United States commissioner for the extradition of a fugitive under the treaty with that country, the commissioner should decline to proceed with the inquiry until a translation of the papers containing the charges are produced before him; but in such a case he should so advise that Government and make a liberal allowance of time for the production of such translation before returning the papers. 428.
2. While such treaty does not in terms provide for such translation, yet the proceedings thereunder must accord with the rules and forms of the tribunals of that jurisdiction to which recourse is had; and inasmuch as the commissioner is the sole judge of the weight and sufficiency of the evidence upon which extradition is sought, it follows that such evidence must be presented in a language that is intelligible to him. *Ib.*

FISHING VESSELS.

See VESSELS, 5.

FLOOD TIDE.

See RIVERS AND HARBORS, 2, 3.

FLOYD COUNTY, GEORGIA, BONDS.

The proposed issue of interest-bearing bonds by the county commissioners of Floyd County, Ga., will not be in conflict with the banking laws of the United States. 70.

FORFEITURES.

See PENALTIES, 2, 3.

FRAUD.

A fraud committed by one member of a partnership in a transaction which he is conducting on behalf of the firm is regarded as a fraud of the firm, whether successful or unsuccessful, and although it was the purpose of the partner to cheat his own firm as well as the United States. 90.

FUNDS IN DISPUTE.

See MONEY IN DISPUTE, ETC., 1, 2.

FURLOUGHS.

See SECRETARY OF AGRICULTURE, 1.

FUR SEALS.

See SEAL FISHERIES.

GALVESTON HARBOR.

See RIVERS AND HARBORS, 8, 9.

"GENERAL ARMSTRONG," BRIG.

See CLAIMS, 3, 4.

GOVERNMENT EMPLOYEES.

1. Government employees are not entitled to witness fees when subpoenaed to testify in behalf of the United States, but are entitled to their expenses. When subpoenaed by a private party, they may demand and accept witness fees. 263.
2. Absence of employees of the Government in the discharge of military duties is not to be charged to the thirty days' leave allowed them for rest and recreation. 353.

See ABSENCE; CIVIL SERVICE; EXECUTIVE DEPARTMENTS; PUBLIC OFFICERS; STATE DEPARTMENT, 1.

GREAT FALLS OF THE POTOMAC.

See DAMAGES.

GREAT LAKES.

The Great Lakes are high seas within the meaning of the act of August 19, 1890. 106.

See NAVIGATION RULES, 2.

GUADALUPE HIDALGO.

See TREATIES, 6-9.

HYDRAULIC MINING.

See CALIFORNIA DÉBRIS COMMISSION, 1, 2, 3.

IMMEDIATE TRANSPORTATION ACT.

It is within the power of the Secretary of the Treasury to require of common carriers transporting merchandise in bond, under the immediate transportation act, to file a bond agreeing to accept and transport, within a definite fixed period of time, all merchandise offered under the act. 369.

IMMIGRANT STATION.

See ELLIS ISLAND IMMIGRANT STATION.

IMMIGRANTS.

Certain steamship companies dispute the validity of the regulations of the Treasury Department, holding them liable for the maintenance and transportation to the seaboard, under the act of March 3, 1891, of certain alien immigrants who had reached the interior of the country: *Held*, that the enforcement of the regulation is the duty of the Department of Justice, and the opinion of the Attorney-General can not be required thereon. 6.

IMPORTED MATERIALS.

See CUSTOMS LAWS and REGULATIONS, 42-48.

INCOME-TAX LAW.

See TAXATION, 8, 9.

INDIAN DEPREDAATION CLAIMS.

1. Payments of Indian depredation claims are not payments for the benefit of the Osage Indians within the meaning of section 12 of the act of July 15, 1870, and can not be authorized by the President under its terms. 131.
2. The same considerations apply in the case of the Ute Indians under the act of June 15, 1880. *Ib.*
3. The President is not charged with any power or duty of approval or disapproval respecting the payments of Indian depredation judgments from annuities and property of Indians or from appropriations on their account, but all authority and discretion in the premises are vested in the Secretary of the Interior. *Ib.*

INDIAN TERRITORY.

See ARMY, 1.

INDIANS.

1. The word "subjects" is used in treaties and international awards chiefly because the inhabitants of monarchies are called subjects instead of citizens, yet in the act of April 6, 1894, it was intended to embrace Indians. 466.

INDIANS—Continued.

2. Indians are not commonly understood to be embraced by the laws of Congress, yet they may be and often are, and whether they are or not is a question of intent. *Ib.*

See SEAL FISHERIES, 12.

INFORMERS.

The Secretary of the Navy has implied authority to contract with persons for their compensation in furnishing information of frauds practiced upon the Government in the supply of equipment which was not according to contract. 1.

INJUNCTIONS.

See PROCEDURE, 1, 2.

INSPECTION.

See MEAT INSPECTION.

INSPECTION CERTIFICATES.

Consular officers of the United States can not extend expired inspection certificates granted to American steamers, nor is there any authority of law for sending local inspectors out of the country to make inspection. 52.

INSPECTORS OF HULLS AND STEAM BOILERS.

See CIVIL SERVICE, 9.

INTERNAL REVENUE.

1. The provisions of the South Carolina dispensary law of 1893 is ineffective and inoperative as against distilled liquors held in a United States bonded warehouse under the control of a collector of internal revenue. 73.
2. Distilled liquors in a bonded warehouse are exempt from the operations of the process of a State court. *Ib.*

INTERNATIONAL LAW.

1. Arms and munitions of war, and in some cases the ship carrying them, are subject to seizure by the government within whose jurisdiction they come if its domestic laws or regulations are violated, but international law imposes no duty upon the United States with respect to such transactions. 267.
2. International law takes no account of a mere insurrection, confined within the limits of a country, which has not been protracted or successful enough to secure for those engaged in it recognition as belligerents by their own government or by foreign governments. *Ib.*
3. The obligation of preventing hostile expeditions against a friendly nation is one of diligence and not a guaranty against such expeditions; and what constitutes diligence depends upon the circumstances in each case. *Ib.*
4. The Executive has no right to interfere or control the action of the judiciary in proceedings against persons charged with being concerned in hostile expeditions against friendly nations. *Ib.*

INTERNATIONAL LAW—Continued.

5. The neutrality laws of the United States, so called because their main purpose is to carry out the obligations imposed upon the United States while occupying a position of neutrality toward belligerents, were also intended to prevent offenses against friendly powers, whether they should or should not be engaged in war or in attempting to suppress revolt. *Ib.*
6. The failure of the United States to pass neutrality laws would not diminish its international obligations, nor would the passing thereof increase such obligations. *Ib.*
7. The revenue and police regulations of a country have never been recognized by international law as coming within the rules regulating the conduct of other nations. *Ib.*
8. The duty of the United States, when a state of war is declared or recognized by another country, is of its own motion to use diligence to discover and to prevent within its borders the formation or departure of any military expedition intended to carry on or take part in such war. *Ib.*
9. The fundamental principle of international law is the absolute sovereignty of every nation as against all others within its own territory. 274.

See CUBAN INSURRECTION.

IOWA RESERVATION.

See DISTRICT OF COLUMBIA, 2.

IRRIGATION.

See RIO GRANDE RIVER; TREATIES, 8, 9.

JUDGES, RETIREMENT.

See COURT OF CLAIMS, 1, 2.

JUDGMENTS.

1. The Secretary of the Treasury is not authorized by section 3469, Revised Statutes, to remit or release any portion of a judgment indebtedness on consideration of hardship to certain individuals. The authority to compromise relates to claims of doubtful recovery or enforcement. 50.
2. He has no authority to remit or release judgments in favor of the Government from which there is no appeal and which are clearly recoverable. 264.
3. One final judgment on the merits rendered in one action can be pleaded in bar in all others upon the same cause of action. 447.

JURISDICTION.

See ACTIONS, 9.

LABORERS.

See CHINESE.

"LABORERS AND MECHANICS."

Certain foremen of mechanics at the Fort Leavenworth military prison are not "laborers and mechanics" within the eight-hour law of August 1, 1892. 32.

LACHES.

See ACTIONS, 2.

LANDS AND LAND PATENTS.

1. Patents to Mexican land grants in California under the act of March 3, 1851, were conclusive only as between the United States and the patentees, and did not affect the interests of third persons. 13.
2. The surveys confirmed by such patents do not preclude a legal investigation and decision by the proper tribunals between conflicting claimants. *Ib.*

See ACTIONS, 1-3; PUBLIC LANDS; REAL ESTATE.

LAWS OF THE LAND.

A "municipal ordinance" is comprehended by the phrase "laws of the land" as used in the fifty-ninth article of war, and a soldier violating such an ordinance and escaping to a military reservation should be surrendered to the civil authorities for trial upon demand. 88.

LEASE.

1. There can not strictly be a lease of a use. 476.

See ELLIS ISLAND, ETC., 4.

LEAVES OF ABSENCE.

See ABSENCE.

LEGAL ADVICE.

The Commissioner of Patents should submit to the law officers assigned to the Department of the Interior questions arising in the administration of his department upon which legal advice is desired. 174.

See DEPARTMENT OF JUSTICE, 1, 2.

LIBEL.

Any publication in an official circular of the ground upon which an officer or employee of the Government has been suspended or discharged from the public service will not support a cause of action for libel against the officer making such publication, provided it is made in good faith, without malice, in the performance of an official duty, and with the design only of promoting the public interests. 320.

LICENSES.

1. Licenses are not required for vessels engaged in fur-seal fishing in other waters than those covered by the award of the Paris Tribunal and the act of Congress of April 6, 1894. 239.
2. When the license of a custom-house broker has been revoked, he can not thereafter deal directly with the customs officials, except when acting for himself as principal. 255.
3. The Secretary of the Treasury may grant a license, revocable at his will, to erect and maintain a building on Ellis Island, an immigrant station, for the purpose of an exhibition hall and conducting a land and labor bureau. 473.

LICENSES—Continued.

4. He has no power to lease for any length of time Government property without express authority of law, though he may license the use thereof. 476.
5. A revocable license without limitation of time given by the Secretary of War for the erection of a Roman Catholic chapel on a military reservation at West Point transcends the statute. 537.

LIENS.

1. A mechanic's lien will not lie against property of the United States. 18, 78.
2. Assuming that the title to the land on which the dry dock at Port Royal is built and the exclusive jurisdiction over it are in the United States, the mechanics' lien laws of South Carolina do not operate thereon and claims under such laws may be ignored in the settlement with contractors. 18.
3. On the grounds of public policy, the mechanics' lien laws do not generally, in the absence of expressed provisions, apply to public buildings erected by States for public use. *Ib.*
4. The owner or consignee of a vessel arriving from a foreign port is entitled to a lien for freight on the merchandise imported on such vessel for the purpose of exportation. 38.
5. The Treasury Department may legally accept the revenue cutter Calumet subject to a creditor's lien, and after satisfying the lien proceed against the contractor's bondsmen to recover payment made in excess of the contract price. 70.

LIFE-SAVING CORPS.

See LIFE-SAVING MEDALS, 5.

LIFE-SAVING MEDALS.

1. Section 12 of the act of June 18, 1878, does not authorize the Secretary of the Treasury to bestow life-saving medals for signal service made in saving persons from drowning in small inland streams, ponds, and pools. 65.
2. The waters contemplated by such section are either the high seas or what might be described as waters of the United States. *Ib.*
3. Section 12 of the act of June 18, 1878, with reference to the awarding by the Secretary of the Treasury of life-saving medals of the second class upon persons for bravery in "succoring the shipwrecked and saving persons from drowning," refers only to those cases where the rescued were suffering from the perils of the sea either by actual shipwreck or from being upon or connected with any vessel in distress. 124.
4. It applies only to those who are in danger of drowning in any of the waters of the United States in the vicinity of a life-saving station, life-boat station, or house of refuge. *Ib.*
5. The intent of such statute was to provide for the bestowal of such medals of honor upon the regular or volunteer members, whether permanent or temporary, of the life-saving corps. *Ib.*

LOTTERIES.

1. The plan of business of a certain company considered and declared to be in the nature of a lottery within the meaning of sections 3894 and 4001, Revised Statutes, as amended by the act of September 19, 1890, and the use of the mails by it forbidden. 4.
2. The advertisements in *Le Petit Journal*, a French publication, considered and held to fall within the prohibited class defined in section 3894, Revised Statutes, as amended by the act of September 19, 1890, as unmailable. 171.
3. The acts of Congress authorizing the Postmaster-General to withhold mail matter from persons and concerns engaged in conducting a lottery or gift enterprise, etc., are constitutional, and empower him to deny mail facilities to all such. 313.
4. The name "lottery" covers any determination of gain or loss by the issue of an event which is merely contrived for the occasion. It is none the less a lottery because it is fairly conducted or because such conduct is amply secured. *Ib.*

MAILS.

1. Interference with the carriage of the mail on railroads in the usual and ordinary way is a criminal offense, and the combination of offenders may be prosecuted under section 5440, Revised Statutes. 8.
 2. The extension of the free-delivery service of the Detroit post-office so as to permit the delivery of mail to vessels in Canadian waters is not legally authorized. 173.
 3. Public interests require that the Government should have a monopoly of the business of carrying the mail. 394.
 4. The Monthly Bulletin containing advertisements of private firms or corporations, published by the Bureau of American Republics, is entitled to transmission through the mails free of postage, under the act of February 20, 1897. 514.
- See LOTTERIES, 1, 2, 3; RAILROAD COMPANIES, 1-7.

MAKAH INDIANS.

See SEAL FISHERIES, 12.

MARINE CORPS.

See ACCOUNTS, 2; PENSIONS, 1, 2.

MARINE-HOSPITAL FUNDS.

Sick and disabled officers and seamen of the Revenue-Cutter Service are entitled to the benefit of the Marine-Hospital funds provided for sick and disabled seamen. 340, 365.

MEAT INSPECTION.

1. A criminal prosecution will not lie for falsely representing in a label placed on canned meat that the meat contained in the can has been inspected in accordance with the act of March 3, 1891. 128.

MEAT INSPECTION—Continued.

2. It is the duty of the Secretary of Agriculture, under the act of March 2, 1895, to make regulations to prevent the transportation of condemned carcasses of cattle, sheep, etc., inspected in accordance with the provisions of this act. 167.
3. The act of March 3, 1891, imposes a penalty for transporting the carcasses or the food products thereof, declared to be unsound or diseased, but the law does not require that they should be rendered unfit for human food. *Ib.*
4. The Department of Agriculture is not required to effect the prevention of the consumption of diseased meat as human food within the State of its origin and without its having been carried out and brought back into such State. *Ib.*
5. It can not compel the destruction of pork, although affected with trichina, nor can it license its use under limitations and restrictions. 167.
6. Section 2 of the act of March 2, 1895, with reference to the inspection of cattle the meat of which is intended for exportation, relates alone to live cattle and the meat of cattle, and any reasonable regulation affecting these and these alone is authorized by the statute. 229.
7. An act of Congress providing for the inspection of beef intended for exportation, and that no clearance shall be given to any vessel having on board for exportation uninspected beef, does not authorize the making of a regulation by the Secretary of Agriculture requiring that meat other than beef products shall be so marked as to show the species of animal from which it was produced, classifying all unmarked packages of meat as uninspected beef and refusing clearance to vessels having on board such unmarked packages. 229.

See CATTLE, 1, 2.

MECHANIC'S LIEN.

A mechanic's lien can not be acquired upon property of the United States. 78.

See LIENS.

MEDALS.

See LIFE-SAVING MEDALS; WORLD'S COLUMBIAN EXPOSITION, 2-7.

MERCHANDISE.

See WORDS AND PHRASES.

MERCHANT MARINE.

See VESSELS.

MEXICAN LAND GRANTS.

See LANDS, ETC., 1, 2.

MEXICO.

See CONGRESSMEN, 1; TREATIES, 6-9.

MILITARY ACADEMY, WEST POINT.

1. In selecting the granite for the Memorial Hall at West Point the safest plan is to designate certain fixed standards, each bid being upon the separate kinds with the right added to the board to make selection. 240.
2. A revocable license without limitation of time given by the Secretary of War for the erection of a Roman Catholic chapel on the military reservation at West Point transcends the statute. 537.

MILITARY EQUIPMENT.

See NATIONAL GUARD.

MILITARY RESERVATIONS.

1. A revocable license without limitation of time given by the Secretary of War for the erection of a Roman Catholic chapel on the military reservation at West Point transcends the statute. 537.
2. An explicit authority is necessary for even a transient occupation of a military reservation for other than its special purpose. *Ib.*
3. Permanence of right of occupation is forbidden by the act of July 28, 1892, and consequently an occupation which contemplates permanency or duration longer than five years is forbidden. *Ib.*
4. The Secretary of War has no power to accept for the Government a donation of a building erected upon a military reservation, where the acceptance is accompanied by a limitation for its use in perpetuity by the Roman Catholics. *Ib.*
5. The Secretary of War has no authority to grant permission for the erection of a Bethel, reading room, and library within the army reservation on Ship Island. 565.

MILITIA.

The Fifty-eighth Pennsylvania Regiment of Militia was not in the military service of the United States in such sense as to entitle Capt. Frederick Huidekoper to a certificate of discharge from the United States. 130.

See NATIONAL GUARD.

MINORS.

1. The consent of parents and guardians to enlistments in the Navy of minors over 18 years of age is not necessary to make the enlistment valid. 327.
2. The period at which persons reach their majority and become *sui juris* with respect to the ordinary affairs of life can not abridge this power of the General Government. *Ib.*
3. The United States have a right to prescribe the rules and conditions under which voluntary or compulsory services are to be rendered by citizens. *Ib.*
4. If a statute permits a man to bind himself by enlistment during his minority, there is no reason why he can not bind himself for a further period. *Ib.*
5. The phrase "other persons" in section 1416, Revised Statutes, includes all persons over 18 years, whether of age or not. *Ib.*

MISTAKE.

1. If a bid for the construction of public works has been accepted, it can not be withdrawn by the contractor because he made a clerical error in preparing his estimates, as the mistake was not mutual, but was due to negligence. 186.
 2. A soldier should not be held accountable for money paid him in excess of the amount to which he was entitled where such payment was made through a mistake of law on the part of the executive officers of the Government. 323.
- See CUSTOMS LAWS AND REGULATIONS, 71-77.

MODIFICATION OF CONTRACTS.

See CONTRACTS, 1, 3, 4, 6, 7.

MONEY IN DISPUTE.

1. A disbursing officer of the United States holding a Treasury draft payable to certain contractors can not with propriety or safety be directed to turn it over to a receiver appointed by a State court in an action between contesting claimants. 75.
2. Funds in the hands of the Secretary of War may be retained by him pending a controversy between the parties claiming them until a final adjudication of the whole matter by the tribunal to which the parties may last resort. 447.

"MOST-FAVORED-NATION CLAUSE."

See TREATIES, 1-3.

NATIONAL GUARD.

Certain arms furnished the Washington Light Infantry of Charleston, S. C., are held by the State of South Carolina for the use of the whole body of the militia of the State in such manner and in accordance with such rules and regulations as the authorities of the State may prescribe. 54.

See ABSENCE, LEAVES OF, 3, 4.

NATURALIZATION.

See CITIZENSHIP.

NAVAL ACADEMY.

1. The act of March 2, 1895, authorizing Representatives or Delegates in Congress to recommend a candidate for appointment as a cadet at the Naval Academy of the United States limits this right to members of the then existing Fifty-third Congress. 164.
2. In order for such a recommendation to be valid, it should have been made before 12 o'clock noon of March 4, 1895; consequently three recommendations made on that day, but received at the Navy Department after such hour, are ineffective. *Ib.*
3. The Secretary of the Navy has no right to call for a new recommendation for appointment of a cadet at Annapolis, even though he had not acted upon the recommendation until after the Congressman who made it was unseated, unless it be under section 1516, Revised Statutes, where the candidate failed to pass. 342.

NAVAL ACADEMY—Continued.

4. The nomination of a cadet for appointment at the Naval Academy by a Congressman who was subsequently unseated by contest of election is good, and the candidate can not lawfully be deprived of his place if he passes his examination. *Ib.*

NAVAL OFFICERS.

See NAVY, 1-6, 9-11.

NAVAL REGULATIONS.

See NAVY, 2-4.

NAVAL SUPPLIES.

See ADVERTISEMENTS, 5, 9; BIDS, 1, 2.

NAVIGABLE DEPTH.

"Navigable depth" is a depth sufficiently wide to be navigated by vessels either moved by sails or steam and to permit them to pass each other. 29.

NAVIGABLE WATERS.

1. Where a State has granted authority to construct a bridge over a navigable river and the location and plan has been approved by the Secretary of War, the question whether the purchasers of such right are authorized to proceed is one which does not concern the Government. 293.
2. The St. Louis and Cloquet rivers are navigable waters of the United States, and the Secretary of War had exclusive authority to permit their obstruction by dams, but can not revoke his permit when large sums of money have been expended on the faith thereof. 41.
3. The act of September 19, 1890, as amended, intended that the navigable waters of the United States should thereafter be under the exclusive control of the United States; and that for the future their navigability should be interfered with by bridges, dams, or other obstructions only by express permission of the United States granted by the Secretary of War. *Ib.*
4. It is the duty of the Secretary of War to act upon a petition to have designated the portion of a river within which refuse matter may be discharged, in accordance with the provisions of the act of August 18, 1894, chapter 299, section 6, although the navigability of the river will not be affected. 305.
5. In making such designation he should be governed only by considerations affecting the navigation of the river or which may affect its future navigation. 305.
6. The power of Congress over navigable streams is supreme, and grows out of the power to regulate commerce. 430.
7. Congress may declare what is an obstruction and remove it. *Ib.*
8. When Congress chooses to act, it is not concluded, by anything that the States or that individuals by its authority have done, from assuming entire control of the matter and abating any erection that may have been made and preventing any others from being made, except in conformity with such regulations as it may impose. *Ib.*

NAVIGABLE WATERS—Continued.

9. The provision in the river and harbor act of September 19, 1890, that whenever the Secretary of War shall determine that any bridge constructed over "any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters," he shall give notice to have such obstruction removed or remedied, is not an unconstitutional delegation of the legislative functions. 430.
10. Where a bridge was erected by authority of a State before Congress assumed actual jurisdiction over the river for the purposes of navigation, and it was declared an obstruction to navigation by the Secretary of War under the above act, such obstruction can be abated without compensation by the United States for the expenses incurred. *Ib.*
11. The control and supervision of the navigable waters of the United States is placed in the Secretary of War. 518.
12. The remedy of the United States in case of the erection of a dam without authority across the Rio Grande River is by injunction under section 10 of the act of September 19, 1890. 518.
13. The Secretary of the Interior has no power, under the provisions of the act of March 3, 1891, to authorize the damming of the Rio Grande River for irrigation purposes. 518.
14. The Secretary of War is authorized, under the act of July 13, 1892, to permit the construction of a canal connecting Port Arthur, Tex., with Sabine Pass, a navigable water improved at the expense of the Government, for a canal is such a work as is provided for in section 7 of said act.
15. Although the Attorney-General can not determine without considering questions of fact whether or not a bar in Flushing Creek formed opposite the mouth of a sewer and offering an obstruction to navigation is such a case as comes within the exception provided in section 6 of the act of August 17, 1894, the Secretary of War is not precluded from taking such action inviting the attention of the town authorities of Flushing to the matter as may be advisable. 594.

See CALIFORNIA DÉBRIS COMMISSION, 1.

NAVIGATION RULES.

1. Rules 6 and 7 of section 4223, Revised Statutes, relating to river steamers navigating waters flowing into the Gulf of Mexico and their tributaries, and to coasting steam vessels, etc., navigating the bays, lakes, or other inland waters, are repealed by the act of August 19, 1890. 106.
2. The act of August 19, 1890, adopting the regulations for preventing collisions at sea are applicable to all waters navigable for seagoing vessels and connected either with the ocean or with the Great Lakes, and also applicable to every kind of steam vessel. 106.
3. The Board of Supervising Inspectors of Steam Vessels have power to make regulations not inconsistent therewith. 106.

NAVIGATION RULES—Continued.

4. The provision of section 4234, Revised Statutes, requiring sailing vessels to show a lighted torch on the approach of any steam vessel during the night time was not repealed by section 3 of the act of February 19, 1895. 227.
5. Sections 12 and 13 of the act of March 3, 1897, relating to the navigation laws, which amends section 4233, Revised Statutes, are special rules duly made by local authority according to the provisions of article 30 of the act of 1890. 513.
6. Those portions of the international regulations for preventing collisions at sea prescribed by the act of August 19, 1890, which did not interfere with the operations of the special rules duly made by the local authorities according to the provisions of article 30 as construed by the act of 1895 are rules for the guidance of American vessels on the high seas as well as on all waters connected therewith navigable by seagoing vessels. 513.

NAVY.

1. The status of members of the staff corps of the Navy are governed by sections 1485, 1486, and 1487, Revised Statutes. 46.
2. Article 21 of the Naval Regulations is within the authority conferred upon the Secretary of the Navy by section 1547, Revised Statutes. *Ib.*
3. There is no inconsistency between sections 1483 and 1484, Revised Statutes, in their operation upon the question of the precedence of engineer officers of the Navy. *Ib.*
4. The orders, regulations, and instructions issued by the Secretary of the Navy, with the approval of the President, for the government of the Navy have the force of the statute law when not inconsistent therewith. *Ib.*
5. The rule of the Febiger Board for ascertaining the date of precedence of officers on the active list of the Navy is in conflict with the act of August 5, 1882. *Ib.*
3. B. entered the Navy September 20, 1854; on February 8, 1868, he was dismissed from the service; on March 1, 1871, pursuant to a joint resolution of Congress, he was reappointed; on September 20, 1894, at his request, he was placed upon the retired list under the provisions of section 1443, Revised Statutes: *Held*, that as he had not been forty years in actual service of the United States, the retiring order was without effect, and he should be restored to the active list of the Navy. 103.
7. Paymasters of the Navy may receive from enlisted men or petty officers, for deposit under the act of February 9, 1889, accumulated savings to any amount, providing they represent the earnings of such a person as an enlisted man or petty officer in the United States Navy. 498.
8. The consent of parents and guardians to enlistments in the Navy of minors over eighteen years of age is not necessary to make the enlistment valid. 327.

VY—Continued.

9. The person to be employed under the act of February 19, 1897, to supervise the completion of the tables of planets may be designated either by the order of the Secretary of the Navy or of the head of the Bureau, which order need only designate the person selected as a competent mathematician and the compensation he is to receive. 507.
 0. There is no objection to the employment of a retired officer to supervise the completion of this work. *Ib.*
 1. As adequate power resides in the Secretary of the Navy to cause the arrest of an officer for mal-appropriation of public funds, notwithstanding the fact that he has been arrested by the civil authorities for the same offense, and discharged on bail, it is improper to cause his arrest by the civil officers in order to his trial for a naval court-martial. 504.
 2. The appropriation for special speed premiums made by the act of July 26, 1894, is not limited in its application to premiums earned prior to January 1, 1894. 84.
- See ACCOUNTS, 2, 3; CONTRACTS, 1; MINORS, 1-5; PENSIONS, 1, 2; PUBLIC LANDS, 2.

UTRALITY LAWS.

See INTERNATIONAL LAW.

RTH AMERICAN COMMERCIAL COMPANY.

The Secretary of the Treasury can not rightfully require the North American Commercial Company to furnish security to the amount of its indebtedness for the years 1894 and 1895 in addition to the \$50,000 of bonds already made pursuant to section 1963, Revised Statutes. 177.

RTHERN PACIFIC R. R. CO.,

See PUBLIC LANDS, 7-9.

THS.

See CUSTOMS LAWS AND REGULATIONS, 26-29.

FICE.

1. The President can appoint to office only those who are eligible under the Constitution. His appointment of one not eligible is a nullity. 211.
 2. A statute making an appropriation for certain employment, providing no permanency to the term or contemplating none of the usual formalities in the selection of an employee for such service, as the taking of an oath or receiving a commission, does not create an office. 507.
- See CONGRESSMEN, 1, 2.

FICERS.

See ARMY OFFICERS; NAVY, 1-6, 9-11.

OFFICIAL BONDS.

See BONDS, 3.

OPTION.

See CLOUD UPON THE TITLE.

OSAGE INDIANS.

Payments of Indian depredation claims are not payments for the benefit of the Osage Indians within the meaning of section 12 of the act of July 15, 1870, and can not be authorized by the President under its terms. 131.

OVERHEAD WIRES.

See DISTRICT OF COLUMBIA, 2.

PACIFIC RAILROAD COMPANIES.

See CENTRAL PACIFIC RAILROAD COMPANY.

PAPERS.

See POST-OFFICE DEPARTMENT, 1.

PARDON.

As in some of the States a person convicted of an offense which the laws of the United States call a misdemeanor loses his right to vote, sit as juror, etc., if the action of the President on an application for pardon depends simply on the question of necessity for pardon, such necessity exists, unless the applicant is to be prevented from freely changing his residence under penalty of losing his rights of citizenship thereby. 242.

PARKS AND RESERVATIONS.

See DISTRICT OF COLUMBIA, 3, 4.

PARTNERSHIP.

See FRAUD.

PASSPORT.

See CHINESE, 10.

PATENT OFFICE.

1. A rule promulgated by the Commissioner of Patents with the approval of the Secretary of the Interior, limiting appeals in patent cases to six months from the time when in a condition for appeal, is not in contravention of the law. 122.
2. A rule or regulation made by the Commissioner of Patents and adopted and approved by the Secretary of the Interior, under section 483 Revised Statutes, is a regulation prescribed by the head of a Department, and as such, when not inconsistent with law, has the force of law and is taken judicial notice of by the courts. *Ib.*
3. The Commissioner of Patents should submit to the law officers assigned to the Department of the Interior questions arising in the administration of his Department upon which legal advice is desired. 174.

PATENTS.

1. Goods smuggled into the United States may be seized and sold by a collector of customs, although protected by patents. 72.
2. A preliminary injunction may be granted to restrain the manufacture or use of a patented invention prior to the final determination of the case. 96.
3. An injunction will not lie against one of the departments of the Government to restrain the manufacture or use of an article alleged to be an infringement of a patented invention, nor will a claim for damages lie against the Government for such use. *Ib.*
4. Where loss and injury may result to the Government from the appropriation by its contractors of a patented invention or other property of third persons, a bond of indemnity should be required as a part of a contract. *Ib.*

PAYMASTERS' CLERKS.

See CIVIL SERVICE, 14.

PAYMENT THROUGH MISTAKE.

See MISTAKE, 2.

PENALTIES.

1. A penalty imposed under a contract for delay in completing a work which has been finished according to the contract without damage to the Government, may be remitted by the Secretary of War and the sum withheld paid to the contractor. 27.
2. The provision in a contract providing for the forfeiture of \$20 per day for each day's delay in completing certain work at West Point Military Academy is to be regarded as a penalty, and in case of delay it is lawful to assess against the contractor the actual damages sustained instead of the penalty. 139.
3. The distinction between the compromising of a doubtful case and the remission of a penalty, forfeiture, or disability is that the former is strictly a fiscal one, while the latter is in the nature of a pardoning power. 264.

See CUSTOMS LAWS AND REGULATIONS, 80-89.

PENALTY ENVELOPES.

See MAILS, 4.

PENITENTIARIES.

Prisoners sentenced by a military court-martial to confinement in a United States penitentiary should be conducted thereto by the proper officer of the War Department, and not be turned over to a United States marshal for delivery. 204.

See PUBLIC LANDS, 3-6, 10.

PENSIONS.

1. The provision of section 4724, Revised Statutes, forbidding persons in the Army, Navy, or Marine Corps from drawing both a pension as an invalid and the pay of his rank in the service, is not applicable to retired officers. 408. Reversed, 453.

PENSIONS—Continued.

2. The pension acts of August 29, 1890, and March 3, 1891, providing that thereafter no officer of the Army, Navy, or Marine Corps on the retired list should draw or receive pension under any law, should not have a retrospective effect and forbid the allowance of pension to such person up to and including the last quarterly payment falling due prior to the first-mentioned date. 408.

“PERILS OF THE SEA.”

See WORDS AND PHRASES.

“PERSONAL EFFECTS.”

See CUSTOMS LAWS AND REGULATIONS, 62.

PNEUMATIC GUN CARRIAGE AND POWER COMPANY.

See PREMIUMS, 1, 2, 3.

POLITICAL CAMPAIGN FUND.

See CIVIL SERVICE, 16, 17.

PORT ROYAL DRY DOCK.

See LIENS, 2.

POSSESSION OF FUNDS.

See MONEY IN DISPUTE, 1, 2.

POSTAGE STAMPS.

The counterfeiting of an uncanceled foreign postage stamp comes within the meaning of the phrase “obligation or other securities * * * of any foreign Government” in section 4 of the act of February 10, 1891. 136.

POSTAL SERVICE.

1. The proviso to the act of January 12, 1895, constitutes no substantial limitation upon the power to print and supply “special request envelopes,” under section 3915, Revised Statutes. 119.
 2. The extension of the free-delivery service of the Detroit post-office so as to permit the delivery of mail to vessels in Canadian waters, is not legally authorized. 173.
- See ACCOUNTS, 1; CIVIL SERVICE, 4, 12, 16; LOTTERIES; MAILS; RAILROAD COMPANIES, 1-6.

POST-OFFICE DEPARTMENT.

The disposition of useless papers which have accumulated in the office of the Auditor for the Post-Office Department should be in accordance with the act of February 16, 1889. 151.

PRACTICE.

See ACTIONS; JUDGMENTS; PROCEDURE.

PREMIUMS.

1. The appropriation for special speed premiums made by the act of July 26, 1894, is not limited in its application to premiums earned prior to January 1, 1894. 84.

PREMIUMS—Continued.

2. The contract with the Pneumatic Gun Carriage and Power Company for the construction of a disappearing gun carriage under the act of August 1, 1894, makes no provision for the payment of a premium, and does not bind the Government beyond the amount appropriated. 457.
3. And there is no authority for him to make a supplemental contract binding the Government to further expenditures in the way of premiums. 495.

PRESIDENT.

1. The President can appoint to office only those who are eligible under the Constitution. His appointment of one not eligible is a nullity. 211.
 2. He has no power to remit forfeiture of a judgment on a recognizance elsewhere than in the District of Columbia. 494.
- See CONGRESSMEN, 1; PARDON.

PRINTING AND BINDING.

1. The Public Printer should print and distribute in slip form 760 copies of private bills, postal conventions, etc., under section 56 of the public printing and binding act of 1895. 405.
 2. Under that section the State Department should receive 500 copies of the private laws, conventions, etc., printed in slip form. *Id.*
 3. The allotment of the Public Printer's appropriation among the different departments is not actually passed upon by the accounting officers of the Treasury and is not within their jurisdiction. 423.
 4. The order of the Secretary of State upon the Public Printer, under section 90 of the public printing and binding act of January 12, 1895, for a number of copies of certain Congressional documents, not exceeding the number of bureaus in his Department, should be furnished without being charged to the allotment of his Department. 423.
 5. The word "order" in the clause in section 80 of this act, providing "that no order for public printing shall be acted upon after the expiration of one year, unless the entire copy and illustrations shall be furnished within that period," was not intended to include a joint resolution of Congress for the printing of a "history of international arbitrations," digest, etc. 427.
 6. Under section 90 of the act of January 12, 1895, the head of an executive department has no right to request the Public Printer to furnish a greater number of copies of publications, other than bills and resolutions, than the number of bureaus in the department and divisions in the office of the head thereof. 370.
 7. The head of an executive department may make a requisition on the Public Printer for any number of publications, where the cost of printing is to be charged against such department, and the Public Printer has no authority to pass upon the character of the publications. *Id.*
- See ADVERTISEMENTS, 3, 4.

PRIVILEGED COMMUNICATIONS.

See LIBEL.

PROCEDURE.

1. A preliminary injunction may be granted to restrain the manufacture or use of a patented invention prior to the final determination of the case. 96.
2. An injunction will not lie against one of the departments of the Government to restrain the manufacture or use of an article alleged to be an infringement of a patented invention, nor will a claim for damages lie against the Government for such use. *Ib.*
See ACTIONS.

PROCESS.

Distilled liquors in a bonded warehouse are exempt from the operations of the process of a State court. 73.

PROPOSALS.

See BIDS.

PROTESTS.

See CUSTOMS LAWS AND REGULATIONS, 13, 73, 74, 77.

PRUSSIA.

See CUSTOMS LAWS AND REGULATIONS, 30, 31, 32.

PUBLIC BUILDINGS.

On the grounds of public policy the mechanic's lien laws do not generally, in the absence of express provisions, apply to public buildings erected by States for public use. 18.
See PUBLIC WORKS.

PUBLIC IMPROVEMENTS.

See PUBLIC WORKS; RIVERS AND HARBORS.

PUBLIC LANDS.

1. Lands of the United States within the limits of a State are not subject to her laws, except there be in the act of her legislature, under which jurisdiction was ceded to the United States, a reservation of concurrent jurisdiction to the State. 18.
2. Lands reserved from the public domain for the use of the Navy Department can only be restored to the public domain by Congressional action. 120.
3. The provisions of the act of March 3, 1875, granting certain sections of unappropriated public lands within the State of Colorado to the State for penitentiary purposes, that said lands are to be selected and located by direction of the legislature of said State and with the approval of the President of the United States, on or before a specified day, are not directory, as Congress had no right to give directions to the legislature of a State, but are rather in the nature of conditions precedent and can only be given effect as conditions, and a failure by the

PUBLIC LANDS—Continued.

- designated authorities to select and locate lands within the time named renders the grant inoperative, and after the expiration of said time the President is not authorized to approve a selection and location of said lands. 462.
4. An act requiring a State to make a selection of lands within a specified period after its admission into the Union can not be construed as directions to those whom Congress had no right to direct, as they can only be given effect as conditions precedent, which, if not complied with, prevent the grant from being effectual. *Ib.*
 5. The President is not authorized to approve a selection of public lands for penitentiary purposes by the State of Colorado under section 9 of the act of March 3, 1875. *Ib.*
 6. Failure by the designated authorities of a State to select and locate lands within the time named by an act providing for such selection renders the grant inoperative. *Ib.*
 7. The Northern Pacific Railroad Company, a Wisconsin corporation, having purchased, under a foreclosure sale, the mortgages of the Northern Pacific Railroad Company, the Secretary of the Interior should act upon the application of the former for patents to land, upon the same considerations which would govern in case there had been no foreclosure and the applications were all made by the latter company. 486.
 8. The consideration for the grant of public lands to the Northern Pacific Railroad Company, under the act of July 2, 1864, being the construction and maintenance of a railroad telegraph line, and such obligation having been fully performed by it, the right to have the lands patented was perfect in said company. *Ib.*
 9. Congress, by consenting to the issuing of bonds secured by mortgage on the railway and telegraph lines of the Northern Pacific Railroad Company, necessarily consented to their transfer to the purchaser in case of foreclosure, whether a natural or artificial person, and if the latter, no matter how or by what authority created, would take the property subject to all the continuing rights of the Federal Government just as the original company held it. *Ib.*
 10. The States of South Dakota and Montana having received grants for the erection of penitentiaries, the enabling act under which the two Dakotas, Montana, and Washington were admitted into the Union provided that North Dakota and Washington should have like grants for the same purpose. Washington already has a penitentiary. *Held*, that further legislation is required. 352.

PUBLIC OFFICERS.

When power is given to public officers to be exercised for the public interest the language used, though permissive in form, is in fact mandatory. 167.

PUBLIC PRINTER.

See PRINTING AND BINDING.

PUBLIC PROPERTY.

1. Public property can be subject to claims against it only when it is in the possession of the courts, by act of the Government, seeking to have its rights established. 18.
2. The Secretary of the Treasury has no power to lease for a term of years, or for any length of time, the property of the Government placed in his charge, without express authority of law therefor. 476.

See PUBLIC WORKS.

PUBLIC WORKS.

1. A mechanic's lien can not be acquired upon property of the United States. 78.
2. In a contract for public works, although the representations of an officer of the Government have been relied upon, they must be regarded as wholly personal and of no effect as against the United States. *Ib.*
3. No authority exists in the Secretary of the Navy to incur obligations for the completion of a dry dock where the appropriation has become exhausted, although it would result in a great saving to the Government. 288.

See BIDS, 4-5; CONTRACTS; PUBLIC PROPERTY; RIVERS AND HARBORS.

QUARANTINE AND QUARANTINE REGULATIONS.

1. The Secretary of Agriculture may lawfully provide food for quarantined cattle where they are in danger of loss, but in such case he should hold them until such expenses are repaid, and in case of default sell them. 193.
2. The Secretary of Agriculture may provide and enforce regulations requiring the food and attendance to be furnished quarantined cattle by the owner, under the act of August 30, 1890. *Ib.*
3. In quarantine regulations against yellow fever promulgated by the Secretary of the Treasury an exemption from disinfection, etc., of vessels bound to ports in the United States north of the southern boundary of Maryland does not constitute a discrimination within the meaning of the act of February 15, 1893, providing that regulations shall operate uniformly and in no manner discriminate against any port or place. 446.
4. The authority of the Department of Agriculture to seize and slaughter imported sheep affected with scab, under the act of August 30, 1890, is doubtful. 460.
5. The act of August 30, 1890, provides a summary method of appraisal and payment in the case of the slaughter of animals exposed to infection, but no payment is provided where they are imported in violation of the act. The evident intent of the act was that exposed animals imported in violation thereof were to be slaughtered indiscriminately, without regard to the question of the legality of the importation. 460.

QUARANTINE AND QUARANTINE REGULATIONS—Continued.

6. A Chinese laborer furnished with the necessary certificate, etc., arrived in the United States two days after the period fixed by the treaty, being delayed in quarantine by the Canadian authorities; *Held*, That he could not enter the United States, as his return should have been within the period which the treaty has made the sole provision for delay. 575.
7. Quarantine is not actus Dei, but an ordinary incident of travel, to be contemplated by one undergoing a voyage. 575.

RAILROAD COMPANIES.

1. Railroad companies are prohibited from carrying, outside of the mails, first-class mail matter not in Government stamped envelopes, for companies, corporations, or private individuals operating car lines, transportation lines, hotels, restaurants, or any other class of business that may either be connected or not connected with the railroad company. 394.
2. Any railroad company or any officer or employee thereof, carrying letters which are neither written by that company nor addressed to it, is liable to the penalties imposed by the law. *Ib.*
3. A railroad company can not carry letters from one of its connecting lines to another, although they may relate to through business over the lines of all. *Ib.*
4. A railroad company has the right to carry letters about its own business, written and sent by its officers and agents, without being in Government stamped envelopes. They may be letters to others of its officers and agents, to those of connecting lines, or to anyone else, so long as no other carrier intervenes. *Ib.*
5. Letters of a railroad company addressed to officers or agents of a connecting line on company business, and delivered to an agent of the latter at the point of connection, may be carried by the latter to any point on its line. *Ib.*
6. The term "private hands" as used in section 3992, Revised Statutes, with reference to the conveyance or transmission of mail matter, was evidently intended to cover all except common carriers on post routes. Neither the latter nor their employees, while engaged in this business can be considered as "private hands." *Ib.*
7. Railroad companies can not set up a common right against the conditions which the law incorporates in their contracts with the Government. *Ib.*
8. The act of July 29, 1892, does not authorize the Secretary of War to approve the survey of the Great Falls Electric Railway Company over the lands of the Washington Aqueduct, where the inner rail of said railway is less than the distance specified in said act. 394.

REAL ESTATE.

1. The United States had authority to take possession of and use real estate during the period of the war for war purposes, but

REAL ESTATE—Continued.

- they did not have authority or power, by any summary proceeding, to divest the title of the owner, nor the power to retain possession beyond the period during which the occasion for the taking continued. 382.
2. A proceeding to ouster the Government from such possession, while not maintainable strictly against the United States, may be maintained against the individuals in possession of the premises. *Ib.*
 3. The United States having taken possession and still retaining the same, such possession can not be surrendered by the officers of the Government without authority from the Secretary of War. *Ib.*
 4. If the United States have abandoned such real estate and the lawful owner has entered and taken possession, his possession is lawful and can not be disturbed. *Ib.*
 5. In order to acquire title to land upon which Fort Taylor is located, which was taken possession of by the United States authorities during the war, the proper course is to apply to Congress for its condemnation or purchase. *Ib.*
 6. If the United States is in possession of land taken during the war for war purposes, and is forcibly ejected or ousted, even by the lawful owner, such possession is unlawful and should be restored to the United States. *Ib.*
 7. The United States in their sovereign capacity have power to acquire and hold real estate wherever and whenever needed for the use of the Government in the execution of any of its powers. 455.
 8. Such property may be acquired by any of the means by which natural or artificial persons may acquire property, subject in certain cases to the local laws of the State. *Ib.*
 9. The Secretary of the Treasury, without further authority than the act of March 3, 1891, may accept a voluntary grant of land from the city of Saginaw, Mich., to be used for the purposes of a public building. *Ib.*
 10. No legislation by Congress is needed to enable the United States to take and hold lands received through voluntary gift, devise, or grant. *Ib.*

RECOGNIZANCES.

1. The President has no power to remit forfeiture of a judgment on a recognizance elsewhere than in the District of Columbia. 494.
2. The power to compromise claims in favor of the United States, which includes judgments on recognizances, is vested in the Secretary of the Treasury. *Ib.*

REFUNDS.

See CUSTOMS LAWS AND REGULATIONS, 71-77.

REGISTRY FOR FOREIGN-BUILT VESSELS.

See AMERICAN REGISTRY, 1-5.

REID CLAIM.

See CLAIMS, 3, 4.

RELIQUIDATION OF DUTIES.

See CUSTOMS LAWS AND REGULATIONS, 78, 79.

REMISSION OF PENALTIES AND RECOGNIZANCES.

See CUSTOMS LAWS, ETC., 80-89; RECOGNIZANCES, 1, 2.

REMOVALS.

See APPOINTMENTS AND REMOVALS, 3; NAVAL ACADEMY, 4.

REPRESENTATIONS.

In a contract for public works, although the representations of an officer of the Government have been relied upon, they must be regarded as wholly personal and of no effect as against the United States. 78.

REPRESENTATIVES.

See CONGRESSMEN.

RESIDENCE.

See CIVIL SERVICE, 1.

RETIRED OFFICERS.

See ARMY OFFICERS, 2-5, 7; NAVY, 6, 10.

RETIREMENT OF JUDGES.

See COURT OF CLAIMS, 1, 2.

REVENUE-CUTTER SERVICE.

1. Officers of the Revenue-Cutter Service placed upon "permanent waiting order" under the act of March 2, 1895, are withdrawn from the line of promotion, but may be restored to their former rank when their disability ceases. 286.
2. There is no legal limitation to the number of officers who may be placed upon permanent waiting orders. *Ib.*
3. Sick seamen of the Revenue-Cutter Service are entitled to the benefit of the Marine Hospital funds provided for sick and disabled seamen. 340, 365.
4. The provision in the act of June 4, 1897, that certain chief engineers of the Revenue-Cutter Service "shall be eligible for appointment to the office of captain of engineers in said service, with the pay and emoluments of such captain," creates the office of "captain of engineers," with pay the same as that of a captain of the Revenue-Cutter Service. 551.

See LIENS, 5.

REVENUE LAWS.

Sections 3985 and 3993, Revised Statutes, are revenue laws, and are not to be strictly construed, though they impose penalties. 394.

See CUSTOMS LAWS AND REGULATIONS; TAXATION.

REVISED STATUTES.

In case of doubt as to the construction of a revised statute, reference may always be had to the original act. 190.

RIO GRANDE RIVER.

1. The remedy of the United States in case of the erection of a dam without authority across the Rio Grande River is by injunction under section 10 of the act of September 19, 1890. 518.
2. The Secretary of the Interior has no power, under the provisions of the act of March 3, 1891, to authorize the damming of the Rio Grande River for irrigation purposes. *Ib.*
See TREATIES, 6-9.

RIVERS AND HARBORS.

1. The contract for the construction of a ship canal between the South Pass of the Mississippi and the Gulf of Mexico, by James B. Eads and his associates construed, and former opinions relative to width and characteristics of channel required to be maintained concurred in. 29.
2. Whenever in the judgment of the Secretary of War justice, either to the Government or to the contractor on the works at the South Pass jetties of the Mississippi River, so requires, he has the right to determine the actual height of average flood tide as a datum for measurements. 308.
3. The period to be covered by observations for the purpose of fixing the proper average flood tide of a river depends on science, not on law; but it should be sufficiently long to include every phase of the situation as it is affected by the various causes which operate upon it. *Ib.*
4. The act of June 3, 1896, providing for the improvement of the Chicago River "as far as may be permitted by the existing docks and wharves" confines the improvements within the existing docks and wharves. 471.
5. The river and harbor act of 1896 provided for a deep-water harbor of commerce and of refuge at either San Pedro Harbor or Port Los Angeles and the appointment of a board to select the place and determine the plans of improvement. 587.
6. The decision of the board as to location of the harbor is final. *Ib.*
7. The report of the board considered and the conclusion reached that the project reported by them is a breakwater and that it fulfills the provision of the law and will make within its meaning a harbor for commerce and refuge. *Ib.*
8. Under the contract for the improvement of Galveston Harbor the railway to be built upon trestle work following the line of the jetty must be at the expense of the Government, whether it is the case of original construction or extension. 607.
9. The Government must bear the expense of maintaining the railway upon the original work and upon the extension after the suspension of operations upon these, respectively. *Ib.*
See APPROPRIATIONS, 5, 6, 8-15; NAVIGABLE WATERS.

ROCK CREEK PARK, D. C.

See DISTRICT OF COLUMBIA, 4.

SAN PEDRO HARBOR.

See RIVERS AND HARBORS, 5-7.

SAVINGS.

See NAVY, 7.

SEAL FISHERIES.

1. The Secretary of the Treasury can not rightfully require the North American Commercial Company to furnish security to the amount of its indebtedness for the years 1894 and 1895 in addition to the \$50,000 of bonds already made pursuant to section 1963, Revised Statutes. 177.
2. The British Government present a claim for damages on account of the seizure by American cruisers in the North Pacific Ocean and Bering Sea of the British sealing schooners *Wanderer* and *Favorite* for violation of the laws for the preservation of fur seals, having on board prohibited and unsealed firearms, together with large numbers of seal skins. The schooners were delivered to a British naval officer with a written statement of the facts upon which the seizures had been made, but which did not specifically assert that seals had been taken contrary to law, which officers, without in anywise invoking the action of the courts, released them, having reached the conclusion, after investigation and upon legal advice, that no case could be made out against them: *Held*, there is no liability for damages. 234.
3. There is nothing in the British statutes or orders and instructions issued for their execution which requires any formal charge by officers making seizure of a vessel. An indorsement of the grounds upon which it was seized on the certificate of the vessel is required in order to enable the vessel to proceed to port for trial. *Ib.*
4. The mode provided by the Bering Sea Award act for dealing with vessels seized is to subject them to legal proceedings in the British courts. Delivery to the naval authorities of the country to which the vessel belongs, in place of delivery to its judicial authorities, was merely for convenience and not for the purpose of dispensing with legal proceedings or having a trial by such naval authorities instead. *Ib.*
5. The naval officer to whom delivery is made of a vessel seized under the provisions of this act has no power to review or investigate the seizure. *Ib.*
6. While the acts of both countries are directed only against cases of unlawful seal fishing, they are not limited to the seizure of vessels actually caught in the act, for in all other cases the action must depend upon the evidence and indications. *Ib.*
7. Where reasonable grounds for the seizure of a vessel are shown, there is no liability, although the court has discharged the vessel. *Ib.*

SEAL FISHERIES—Continued.

8. If a liability exists for unlawful seizures, it is governed by the well-settled principles of law common to both countries relative to such liabilities. *Ib.*
9. Licenses are not required for vessels engaged in fur-seal fishing in other waters than those covered by the award of the Paris Tribunal and the act of Congress of April 6, 1894. 239.
10. A regulation of the Secretary of the Treasury prescribing that only a certain race or class of people shall have the privilege of killing sea otter within a certain area would be a violation of section 1915, Revised Statutes, as being a grant of a special privilege. 333.
11. The Secretary of the Treasury is authorized under section 1956, Revised Statutes, as amended, to instruct captains of the fur-seal patrol fleet to seize all foreign vessels found hunting or to have hunted sea otter within the Territory of Alaska and the waters thereof and to all the dominion of the United States in the waters of Bering Sea. 346.
12. The Makah Indians are prohibited as other persons from killing seals in the Pacific Ocean, including the Bering Sea, by the act of March 6, 1894, and the only right they can claim is that of sealing in the particular manner and places permitted in explicit terms by section 6 of the act to coast Indians generally. 466.

See ATTORNEY-GENERAL, 15.

SEA OTTER.

See SEAL FISHERIES, 10.

SEAMEN.

The amount expended by a United States consular officer in providing shipwrecked seamen with food, clothing, and passage to a port in the United States should not be deducted from the wages of such seamen. 25, 34.

See NAVY, 7; REVENUE-CUTTER SERVICE, 3; VESSELS, 4, 7, 9.

SEA STORES.

See WORDS AND PHRASES.

SECRETARY OF AGRICULTURE.

The Secretary of Agriculture can make general regulations under which subordinates in charge of particular localities can furlough, without pay, assistant microscopists, the same to take effect at once. 318.

See QUARANTINE ETC., 1, 2; MEAT INSPECTION, 2, 7; SEEDS, 1, 2, 4.

SECRETARY OF STATE.

It is competent for the Secretary of State to prohibit the publication in the Monthly Bulletin of the Bureau of American Republics of advertisements of private firms or corporations. 514.

SECRETARY OF THE INTERIOR.

The Secretary of the Interior has no power, under the provisions of the act of March 3, 1891, to authorize the damming of the Rio Grande River for irrigation purposes. 518.

SECRETARY OF THE NAVY.

See APPROPRIATIONS, 4; BIDS, 1-3; CONTRACTS, 1; INFORMERS;
NAVAL ACADEMY, 3; NAVY.

SECRETARY OF THE TREASURY.

1. The Secretary of the Treasury has no authority to make distribution of the diplomas and medals directly to the exhibitors of the World's Columbian Exposition. 216.
 2. The Secretary of the Treasury is authorized to make temporary appointments, without certification from the Civil Service Commission, of draftsmen and skilled service, under the act of March 2, 1895. 261.
 3. The Secretary of the Treasury is not required under the act of July 31, 1894, to report to Congress the balances due on postal accounts for the past fiscal year. 296.
 4. The power to compromise claims in favor of the United States which includes judgments on recognizances is vested by law in the Secretary of the Treasury with respect to all claims save those arising under the postal laws. 494.
- See CHINESE, 3, 8, 9, 20, 22; COMPROMISE; CUSTOMS LAWS, ETC., 5, 6, 53, 68, 71-73, 75-77, 79, 80, 82-89; ELLIS ISLAND, ETC., 1-5; JUDGMENTS, 1, 2; SEAL FISHERIES, 1, 10, 11.

SECRETARY OF WAR.

1. A penalty imposed under a contract for delay in completing a work which has been finished according to the contract without damage to the Government, may be remitted by the Secretary of War and the sum withheld paid to the contractor. 27.
 2. The Secretary of War is charged with the custody, care, and protection of the Washington Monument. 215.
 3. If a change in the location of an existing railroad is a necessity in the building of an authorized boat railway, the acquisition by the Secretary of War of the necessary land to make such a change, is merely an incident to the enterprise entrusted to him. 221.
 4. Under the river and harbor act of August 18, 1894, and the act of April 24, 1888, the Secretary of War has full authority to condemn the land necessary for the construction of a boat railway provided for in the former act. *Ib.*
 5. It is within the authority of the Secretary of War to waive informalities in the submission of bids and the written guaranty accompanying the same for the performance of public works, and in specific cases to waive formal defects both in the bids and bonds. 469.
 6. The control and supervision of the navigable waters of the United States is placed in the Secretary of War. 518.
- See MILITARY RESERVATIONS, 4, 5; NAVIGABLE WATERS, 3, 4, 5, 9-11, 14; RAILROAD COMPANIES, 8.

SEEDS.

1. The seeds purchasable under the act of March 2, 1895, by the Secretary of Agriculture for distribution are limited to those described in section 527, Revised Statutes. 162.
2. The Secretary of Agriculture is authorized to make the purchase of such seeds, conformable to section 3709, Revised Statutes, reserving the right to reject any and all bids. *Id.*
3. The act making appropriations for the purchase of seeds for the Department of Agriculture for the fiscal year 1895 does not authorize the purchase of any others than those described in section 527, Revised Statutes. 55.
4. Under the joint resolution (S. R. 43) the Secretary of Agriculture is required to distribute valuable seeds for the year 1896 in accordance with the custom of preceding years. If such custom has varied from year to year, he is free to exercise his discretion, which is merely one of choice and not a discretion to do or leave undone. 321.
5. The appropriation which was made for the purchase of seeds for the Department of Agriculture under the provisions of section 527, Revised Statutes, for the year 1896, is available for purchases which may be made under joint resolution (S. R. 43). *Id.*
6. The act of April 25, 1896, making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1897, authorizes the expenditure of \$130,000 for seed already put up in packages and labeled ready for distribution. 372.

SENATORS.

See CONGRESSMEN.

SHIP'S PAPERS.

See VESSELS, 5.

SMUGGLED GOODS.

Goods smuggled into the United States may be seized and sold by a collector of customs, although protected by patents. 72.

SOUTH CAROLINA DISPENSARY LAWS.

See INTERNAL REVENUE, 1, 2.

SOUTH PASS CHANNEL, MISSISSIPPI RIVER.

See RIVERS AND HARBORS, 1, 2.

SPAIN.

See CUBAN INSURRECTION.

STATE BANK CIRCULATION.

See TAXATION, 6.

STATE DEPARTMENT.

The chief clerk, chiefs of bureaus, and translators of the State Department are clerks within the meaning of section 169, Revised Statutes, and are to be appointed by the Secretary of State. 363.

See PRINTING AND BINDING, 1, 2, 4, 5.

STATES.

As a recourse to law for the settlement or collection of certain bonds issued by certain States and owned by the United States would involve the grave act of suing a State, the Secretary of the Treasury is advised not to institute suit. 478.

See PUBLIC LANDS, 1, 3-6, 10.

STATUTE OF LIMITATIONS.

See ACTIONS, 2.

STATUTORY CONSTRUCTION.

1. If a term has no technical meaning, it must be regarded as used in the ordinary sense. 179.
2. If a usage is not definite, uniform, and general, it is entitled to no weight. 179.
3. If a special meaning has been attached to certain words in a prior tariff act, there is a presumption of some force that Congress intended that they should have the same signification when used in a subsequent act in relation to the same subject-matter. 541.
4. One of the surest methods of interpreting a provision in a tariff law is by its past history. *Ib.*
5. The headings of the schedules in the tariff act have little significance, they being intended only for general suggestions as to the character of the articles within the schedules. 66.
6. As an aid to the construction of a statute, it is proper to consider the original form of the bill and the changes made by amendment. *Ib.*
7. All doubts arising under the act are presumptively to be resolved in favor of the lower rate of duty, save where the act mentions or describes the same article in two different places, when the higher rate governs. *Ib.*
8. Too great weight should not be placed upon exceptions and provisos in the construction of the main provisions of a statute, since they may have been inserted out of an excess of caution. 255.
9. Words should not have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature can not be otherwise satisfied. 408.
10. The ordinary meaning of language must be presumed to have been intended unless it would manifestly defeat the object of the provisions. 420.
11. While the word "may" is sometimes construed as imposing a duty rather than conferring a discretion, especially where the power conferred is to be exercised for the benefit of the public or that of private persons, yet this rule of construction is by no means invariable. Its application depends on the context of the statute and on whether it is fairly to be presumed that it was the intention of the legislature to confer a discretionary power or to impose an imperative duty. *Ib.*

STATUTORY CONSTRUCTION—(Continued.)

12. A statute should receive a reasonable construction and one in consonance with its manifest object and intent. 546.
13. In the construction of a doubtful passage of a statute resort should be had to the immediate context and the legislation in *pari materia*. 124.
14. Where language is ambiguous the probable intent of the legislature should be sought as a guide to the construction. 416.
15. In case of doubt as to the construction of a revised statute, reference may always be had to the original act. 190.
16. A clear omission from a statute can not be supplied upon any considerations of supposed oversight, inconsistency, or hardship. 291, 416.
17. Savings and exceptions are often introduced in a statute from excessive caution. It would sometimes pervert the intentions of an author of a writing if every other thing of the same general tenor as that excepted should be regarded as embraced in the general words. 597.
18. Where two acts are passed on the same day the order of their passage is not important if they can be reconciled. *Ib.*
19. Two acts under legislative consideration at the same time should be construed as contemporaneous acts in arriving at the intent of the legislature. *Ib.*
20. In construing an act it is proper to consider facts which must have been known to Congress, and to assume that it legislated having them in view. *Ib.*
21. Repeals by implication are not favored and are held to have taken place only when the provisions of the earlier and later statutes are irreconcilable and could not have been intended to be operative at the same time. 55, 181.
22. The inconsistency and antagonism between the two must be such that they can not stand together. 119, 203, 227.
23. Irreconcilable conflict is necessary for an implied repeal of a statute, and the presumption is stronger against implied repeals where provisions supposed to conflict are in the same act or were passed at nearly the same time. *Ib.*
24. An act of Congress should not be treated as a nullity if it can by any reasonable construction be made operative. 372.
25. The object of a later act being expressly to amend an earlier act, a feature of the former act which was omitted from the later act was necessarily repealed. 253.
26. The portions of an amended section of a statute which are merely copied without changes are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts or the changed portions are not to be taken to have been the law at any time prior to the passage of the amended act. 159.
27. In measuring the legislative intent as to the scope to be given to a statute in its operation upon previous statutes not specifically referred to, a consideration of the effect upon the public welfare must necessarily be taken in view. 181.

STATUTORY CONSTRUCTION—Continued.

28. In case of inconsistency between a treaty and a subsequent statute the latter controls. 80.
29. A treaty, the provisions of which are self-executing, modifies the requirement of a prior statute with which it is in conflict. 347.
30. The ordinary presumption of a statute is that it lays down a rule of conduct for the future, but makes no change in rights already acquired or conditions already established. 21.
31. When power is given to public officers to be exercised for the public interest, the language used, though permissive in form, is in fact mandatory. 167.
32. Language whose ordinary meaning is permissive only is sometimes held to be mandatory when other parts of the law make plain that it was intended to require and not merely authorize. 391.
33. The appropriation of specific funds "to be immediately available" ordinarily imposes the duty of expending them for the purpose named in the act. 420.

See DEPARTMENTAL CONSTRUCTION, 1-7.

ST. LOUIS AND CLOQUET RIVERS.

See NAVIGABLE WATERS, 2, 3.

STRONG AWARD.

See DISTRICT OF COLUMBIA, 1.

SUBPCENA OF GOVERNMENT EMPLOYEE.

See WITNESS FEES, 1.

SUPPLIES.

It is unlawful for an Executive Department to make a contract for supplies for a longer term than one year from the time the contract was made. 304.

See ADVERTISEMENTS, 1-9; BIDS.

TARIFF ACTS.

See CUSTOMS LAWS AND REGULATIONS; STATUTORY CONSTRUCTION, 3-7.

TAXATION.

1. A tax imposed upon a schooner, under section 4219, Revised Statutes, on account of having employed on board as an officer one not a citizen of the United States should not be remitted, although such person had declared his intention of becoming a citizen, and for three years subsequent thereto continuously served on board American merchant vessels, but had failed to actually perfect his citizenship. 412.
2. The passengers on whom a capitation tax is imposed by the act of August 3, 1882, and August 18, 1894, are those who make the United States their place of destination and not those who merely touch at our ports en route to some other country. 543.

TAXATION—Continued.

3. An assessment made by the Treasury Department of 10 per cent, under the provisions of section 20 of the act of February 8, 1875, upon the circulating notes of Canadian banks which had come into the United States and been received and paid by banks in Calais, Me., is one which may be compromised. 557.
4. Banks of the United States are liable for this tax on such circulating notes which have come across the line and been received by United States banks and paid out as current funds. *Ib.*
5. The intent and meaning of section 20 of this act was to apply the tax to the amount of the circulating notes issued by any of the persons or corporations named in the statute, and used by the banks and other persons therein named. *Ib.*
6. An order on a State bank which can not be used in the community as money without danger of total loss to whoever may take it is not such a note as is embraced within sections 19 and 20 of the act of February 8, 1875, upon which a tax may be imposed. 336.
7. The opinion of the Attorney-General of May 15, 1889, does not conflict with the collection of the special tax on retail liquor dealers in the Indian country and Alaska under section 3244, Revised Statutes. 25.
8. Under the income-tax law mileage and commutation of quarters paid officers of the United States Army are to be considered as parts of the income of such officer, and are to be added to their other income in making up the total income. 112.
9. When the amount paid such officer has reached in the aggregate for the calendar year \$1,000, the paymaster should deduct from the first payment in excess of such amount the tax on the entire amount of such excess of salary payable to such officer for said year. *Ib.*

TENNESSEE EXPOSITION

See CHINESE, 20.

TRADE-MARK.

See COPYRIGHTS, 4.

TRANSPORTATION OF ENLISTED MEN.

See ACCOUNTS, 2, 3.

TREASURY DEPARTMENT.

1. The general appraisers appointed under the provisions of the act of June 10, 1890, are officers of the Treasury Department. 85.
2. The allotment of the Public Printer's appropriation among the different departments is not actually passed upon by the accounting officers of the Treasury, and is not within their jurisdiction. 423.

See ABSENCE, 1, 2; SECRETARY OF THE TREASURY.

TREATIES.

1. Paragraph 608 of the tariff act of August 27, 1894, imposing a discriminating duty on salt imported from a country which imposes a duty on salt exported from the United States, does not violate the "most favored nation clause" in the treaty of May 1, 1828, with Prussia. 80.
2. That treaty is to be taken as operative with respect to so much of the German Empire as constitutes the Kingdom of Prussia, but not so with regard to all the constituent parts of the German Empire. *Ib.*
3. The "most favored nation clauses" of our treaties with foreign powers permits necessary internal regulations for the protection of our home industries, and permits commercial concessions to a country, which are not gratuities but are in return for an equivalent concession. *Ib.*
4. In case of inconsistency between a treaty and a subsequent statute, the latter controls. *Ib.*
5. A treaty, the provisions of which are self-executing, modifies the requirement of a prior statute with which it is in conflict. 347.
6. Article 7 of the treaty of February 2, 1848, known as the Treaty of Guadalupe Hidalgo, is still in force so far as it affects the Rio Grande. 274.
7. Article 7 is limited in terms to that portion of the Rio Grande lying below the southern boundary of New Mexico, and applies only to such works as either party might construct on its own side. *Ib.*
8. The only right the treaty professed to create or protect with respect to the Rio Grande was that of navigation. Claims for injuries to agriculture alone in consequence of the scarcity of water resulting from irrigation ditches wholly within the United States at places far above the head of navigation, find no support in the treaty. *Ib.*
9. The taking of water for irrigating purposes from the Rio Grande, above the point where it ceases to be entirely within the United States and becomes the boundary between this country and Mexico, is not prohibited by said treaty. *Ib.*

See CHINESE; EXTRADITION, 1.

UNITED STATES COMMISSIONERS.

1. The Secretary of the Treasury may return the findings to the United States commissioner in proceedings for the remission of penalties under the act of June 22, 1874, for further hearing upon the claim of newly discovered evidence. 289.
2. But he has no authority to prosecute a further inquiry into the facts after a United States commissioner has reported his findings under section 18 of said act. 549.

See CHINESE, 25; EXTRADITION, 1.

UNITED STATES ATTORNEYS.

See DISTRICT ATTORNEYS.

UNMAILABLE MATTER.

See LOTTERIES.

USELESS PAPERS.

See POST-OFFICE DEPARTMENT, 1.

UTE INDIANS.

Payments of Indian depredation claims are not payments for the benefit of the Ute Indians within the meaning of the act of June 15, 1880, and can not be authorized by the President under its terms. 131.

VESSELS.

1. The owner or consignee of a vessel arriving from a foreign port is entitled to a lien for freight on the merchandise imported on such vessel for the purpose of exportation. 38.
2. Consular officers of the United States can not extend expired inspection certificates granted to American steamers, nor is there any authority of law for sending local inspectors out of the country to make inspection. 52.
3. American steam vessels while engaged in commerce beyond the jurisdiction of the United States, are not subject to the regulations provided by Title 52, Revised Statutes. *Ib.*
4. The act of June 26, 1884, making provision for a class of persons who might be officers of United States vessels, although aliens, not being in conflict or inconsistent with the act of April 17, 1874, both statutes must be regarded as in force. 166.
5. The master of fishing vessels, enrolled but not registered, are not required by sections 4309 and 4310, Revised Statutes, to deposit their ship's papers with the United States consul when they arrive at a foreign port where there is such a consular officer. 190.
6. Licenses are not required for vessels engaged in fur-seal fishing in other waters than those covered by the award of the Paris Tribunal and the act of Congress of April 6, 1894. 239.
7. Section 4598, Revised Statutes, with reference to the absenting of seamen from vessels without leave from the proper officer, where he has signed a contract before a shipping commissioner to perform a voyage, and the apprehension of such deserters, does not apply to a vessel engaged in the coastwise trade of the United States, unless, in compliance with section 4520, such a seaman contracts formally with a vessel of 50 tons burden or upwards. 483.
8. The purpose of section 22 of the Dingley tariff act was to secure to United States vessels the transportation of goods by sea by discriminating against transportation in other vessels to the United States, and also to prevent evasion to a contiguous country. 597.
9. Section 4609, Revised Statutes, with reference to the demanding or receiving of remuneration by anyone from any seamen or persons seeking employment as such, does not extend to vessels engaged in the coasting trade generally. 284.

See AMERICAN REGISTRY; NAVIGATION LAWS; SEAL FISHERIES; TAXATION, 1, 2.

VOLUNTEER SERVICE.

See ARMY OFFICERS, 8.

WAR.

See REAL ESTATE, 1.

WAREHOUSES.

See CUSTOMS LAWS AND REGULATIONS, 15-25.

WASHINGTON AQUEDUCT.

See RAILROAD COMPANIES, 8.

WASHINGTON MONUMENT.

The Secretary of War is charged with the custody, care, and protection of the Washington Monument. 215.

WASHINGTON, STATE OF.

See PUBLIC LANDS, 10.

WEATHER BUREAU.

A vacancy in the office of the Chief of the Weather Bureau can only be filled by appointment of the President or by detailing the Chief Signal Officer of the Army, in accordance with the act of October 1, 1890. 189.

WEST POINT.

See MILITARY ACADEMY, WEST POINT.

WITNESS FEES.

Government employees are not entitled to witness fees when subpoenaed to testify in behalf of the United States, but are entitled to their expenses. When subpoenaed by a private party they may demand and accept witness fees. 263.

WORDS AND PHRASES.

Words should not have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature can not be otherwise satisfied. 408.

AGENT—

The Comptroller and Auditors of the Treasury are agents of the Government in the broad sense of the term, but are more properly called officers, and were not intended to be included within the meaning of the word "agent" in section 3469, Revised Statutes. 361.

The "agent" referred to in that section is one who has special charge of a claim for the purposes of collection or enforcement, in the same way that the district or special attorney has, though he need not possess their professional character. *Ib.*

BROKER—

This word has no definite legal signification. 255.

WORDS AND PHRASES—Continued.

COST—

The word "cost" in section 4136, Revised Statutes, is to be construed liberally, and if the actual cost of the repairs is three times the actual purchase price of the wreck, then she is entitled to registry. 143.

CUSTOMHOUSE BROKER—

As used in the tariff act of 1894, section 23, the term includes persons who deal in drawback matters exclusively, as well as those who combine all branches of customhouse work. 255.

DRAWBACK MONEYS—

"Drawback moneys" are duties; repayment to the importer or the person to whom he has transferred his rights of a part of the duties which have been paid by him upon receiving his goods. 255.

EMPLOY—

In section 169, Revised Statutes, this word is regarded as the equivalent of "appoint." 355, 363.

LOTTERY—

The name "lottery" covers any determination of gain or loss by the issue of an event which is merely contrived for the occasion. It is none the less a lottery because it is fairly conducted or because such conduct is amply secured. 313.

MAY—

While the word "may" is sometimes construed as imposing a duty rather than conferring a discretion, especially where the power conferred is to be exercised for the benefit of the public or that of private persons, yet this rule of construction is by no means invariable. Its application depends on the context of the statute and on whether it is fairly to be presumed that it was the intention of the legislature to confer a discretionary power or to impose an imperative duty. 420.

MAY BE—

The various provisions in the river and harbor act of June 3, 1896, that contracts "may be" entered into by the Secretary of War for the completion of certain improvements, to be paid for out of future appropriations, are not mandatory but discretionary, and he may decline to make contracts in all cases where he is convinced that the public interests will not be subserved by making them. 420.

MERCHANDISE—

The word "merchandise" is used in different senses in different parts of the customs legislation. In sections 2766 and 3111, Revised Statutes, it covers any tangible personal property. In sections 2795 and 3113 it means property imported into the country whether for sale or not. In the act of 1875 it has a narrower meaning, but still includes personal property not imported for the use or enjoyment of the importer himself. 92.

WORDS AND PHRASES—Continued.

MERCHANT—

A Chinese person is not a "merchant" within the meaning of section 2 of the act of March 3, 1893, unless he conducts his business either in his own name or in a firm name of which his own is a part. 5.

MISCELLANEOUS—

The word "miscellaneous" in the act of April 21, 1894, refers to that class of commodities which must be purchased on a considerable scale and used alike by many or all of the various departments and Government establishments in the city of Washington. 59.

MODIFICATION—

To change slightly, as in the form or in the external qualities of a thing, or to change somewhat the form or qualities of. 207.

MORTAR STEEL—

The term "mortar steel" properly includes any steel of such quality as is considered by experts to be adapted for use in the construction of mortars. 179.

MUNICIPAL ORDINANCE—

A "municipal ordinance" is comprehended by the phrase "laws of the land" as used in the fifty-ninth article of war, and a soldier violating such an ordinance and escaping to a military reservation should be surrendered to the civil authorities for trial upon demand. 88.

NAVIGABLE DEPTH—

A depth sufficiently wide to be navigated by vessels either moved by sails or steam and to permit them to pass each other. 29.

NEUTRALITY LAWS—

The neutrality laws of the United States, so called because their main purpose is to carry out the obligations imposed upon the United States while occupying a position of neutrality toward belligerents. They were also intended to prevent offences against friendly powers, whether they should or should not be engaged in war or in attempting to suppress revolt. 267.

NO PERSON APPOINTED TO A PLACE—

The phrase "no person appointed to a place," as used in the civil-service rules substituted by the President November 2, 1894, affects persons holding the positions at the time as well as those thereafter appointed. 91.

ORDER—

The word "order" in the clause in the public printing and binding act of January 12, 1895, section 80, providing "that no order for public printing shall be acted upon after the expiration of one year, unless the entire copy and illustrations shall be furnished within that period, was not intended to include a joint resolution of Congress for the printing of a "history of international arbitrations," digest, etc. 427.

WORDS AND PHRASES—Continued.

PERILS OF THE SEA—

By "perils of the sea" is meant all losses which occur from maritime adventures. 124.

PERMANENT DISABILITY—

A permanent disability is one that appears to be chronic or of indefinite future duration. 286.

PERMANENTLY INCAPACITATED—

Within the meaning of the act of March 2, 1895, an officer is permanently incapacitated when his disability appears to be chronic or of indefinite duration. 286.

PORT—

The word "port" does not always mean a seaport when used in connection with our customs officers, and the word "land" is not necessarily limited to disembarkation from a ship. 357.

PRIVATE HANDS—

The term "private hands" as used in section 3992, Revised Statutes, with reference to the conveyance or transmission of mail matter, was evidently intended to cover all except common carriers on post routes. Neither the latter nor their employees while engaged in this business can be considered as "private hands." 394.

SEA STORES—

"Sea stores," in tariff legislation, are the stores contained in incoming vessels which are necessary for their use for the purpose of the voyage; articles brought into port aboard ship to be consumed aboard or carried off again on the outward voyage, or if put ashore at all, landed only for the convenience of the ship itself. 92.

SPECIAL PRIVILEGE—

A "special privilege" is one which is not open to all persons alike who comply with terms and conditions fairly within the power of all. The limitation of a right to people of a specified race or class is necessarily a "special privilege." 333.

STATIONERY—

The word "stationery" has no special legal definition, but is ordinarily defined as the "articles usually sold by stationers; the various materials employed in writing, such as paper, pens, pencils, and ink." 59.

SUBJECTS—

The word "subjects" is used in treaties and international awards chiefly because the inhabitants of monarchies are called subjects instead of citizens; yet in the act of April 6, 1894, it was intended to embrace Indians. 466.

SUCH—

Ordinarily the word "such" refers to the next immediate antecedent, but not necessarily. Never when the purpose of the section would thereby be impaired. 551.

WORDS AND PHRASES—Continued.

TO BE IMMEDIATELY AVAILABLE—

The appropriation of specific funds "to be immediately available" ordinarily imposes the duty of expending them for the purposes named in the act. 420.

WOOL.

The word "wool," as used in paragraph 297 of the tariff act of 1894, refers to hair of the sheep only, and the new duties upon articles made of the hair of other animals went immediately into effect upon the passage of the act. 66.

"Wool," within dictionary definitions, includes the hair of the alpaca and of the angora goat, but never is used to include all goats' hair, nor yet camels' hair, cow hair, or horsehair. Throughout Schedule K of the above act it is used so as to include even hair of the kinds first mentioned. *Ib.*

The phrase "manufactures of wool" in the above paragraph does not include articles of which wool is a component material, but of which it is not the material of chief value. *Ib.*

WRECK.

The word "wreck" in section 4136, Revised Statutes, must be taken in a very comprehensive sense as applicable to a vessel which is disabled or rendered unfit for navigation, whether this state of the vessel has been caused by the winds or the waves, by stranding, fire, explosion of boilers, or by any other casualty. 198.

WORLD'S COLUMBIAN EXPOSITION.

1. The question of drawbacks upon exhibits of foreign governments at the World's Fair is governed by the act of April 25, 1890, and not by section 3025, Revised Statutes. 36.
2. The Secretary of the Treasury has no authority to make distribution of the diplomas and medals directly to the exhibitors of the World's Columbian Exposition. 216.
3. The receipt and distribution by an authorized committee or subordinate body of the medals and diplomas awarded by the World's Columbian Commission are purely ministerial acts, involving no discretion. They could consequently be delegated by the commission, and, as they were so delegated, delivery can be made either to its executive committee or to the board of reference and control. *Ib.*
4. So much of section 3 of the act of August 5, 1892, as provides for the duplication of medals at the mints of the United States in gold or silver or brass was repealed by the act of March 3, 1893. 253.
5. After the exhibitors shall have received the medals and diplomas awarded them, the Treasury Department has not any authority to say what use shall or shall not be made of them, or to restrict the making or using of facsimiles of them by exhibitors to whom they have been awarded, beyond what is prescribed by the express provision of the statutes already referred to. 330.

WORLD'S COLUMBIAN EXPOSITION—Continued.

6. The law authorizing the Secretary of the Treasury to furnish electrotypes and photographs of the medals of award to exhibitors to whom medals have been awarded, and to newspapers and periodicals for publication, carries with it the authority, to those to whom such electrotypes and photographs may be furnished, to have prints made therefrom without further or more specific authority. *Ib.*
7. The exhibitors, printers, or publishers have not the right to insert the name of the exhibitor in the blank space which will be used for that purpose on the medal. *Ib.*

"WRECK."

See WORDS AND PHRASES.

YELLOW FEVER.

See QUARANTINE, ETC., 3.

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